

Duty to Respond

Mass Crime, Denial, and
Collective Responsibility

Nenad Dimitrijevic



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Collective Responsibility**

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For Mirjana and Tijana

The dead recall
our indifference
The dead recall
our silence
The dead recall
our words.

The dead see our snouts
laughing from ear to ear
The dead see
our copulating bodies
The dead see our hands
poised for applause

The dead read our books
listen to our speeches
delivered long ago

The dead hear
clucking tongues

The dead scrutinize our lectures
join in previously terminated
discussions

The dead see stadiums
choirs ensembles declaiming rhythmically
all the living are guilty

guilty are
little children
who offered bouquets of flowers
guilty are lovers
guilty are
guilty are those who ran away
and those that stayed
those who were saying yes
those who were saying no
those who said nothing

the dead are taking stock of the living
the dead will not rehabilitate us

(Tadeusz Rozewicz, *Posthumous Rehabilitation*)

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* Following conventions in American academic writing diacritical marks are used in names and words in German and French only, with apologies to owners of Croatian, Hungarian, Serbian, etc. names appearing in the book.

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Introduction

1

A disclaimer is due at the very beginning: the incentive for writing this book is non-academic. Its author is a member of a social group in whose name grave crimes were committed in the recent past. I am haunted by the ghosts of the innocent people who were killed in my name. This is perhaps one typical reaction to mass crime, experienced in different historical situations, by many people who share membership in a group with perpetrators of mass atrocities. Hannah Arendt famously dismissed this reaction as a “misplaced feeling [that] can only lead to a phony sentimentality in which all real issues are obscured.”¹ For Arendt, “real issues” following mass crime are guilt and responsibility. While I agree with Arendt’s identification of the central questions, I oppose her claim of the “dangerous irrelevance” of emotional reactions to atrocities committed in one’s name. Consider opposite feelings, which usually prevail in the wake of the fall of a criminal regime: those who supported the old regime react with confusion, self-victimization, or different forms of intuitive denial. Such spontaneous attitudes of the rejection of the truth and its moral impact are with surprising regularity and ease translated into political and cultural strategies which insist on a new beginning *ex nihilo*, where the act of the regime change is perceived as a watershed between a “then” and a “now.”

This book argues that the latter types of reactive attitudes and strategies are morally wrong. No argument developed to support them can stand the test of moral justification. In addition, they are politically and culturally wrong: no such strategies can advance the goal of democratic transition, the rule of law, stability, peace, or reconciliation. Although Chapters Two and Three are devoted to the elucidation of the political and cultural

¹ Hannah Arendt, “Collective Responsibility,” in Hannah Arendt, *Responsibility and Judgment*, ed. by Jerome Kohn (New York: Schocken Books, 2003), 147–148.

error of the “clean sheet” strategy, it is a minor claim of this book. In dealing with politics of silence, culture of denial, and moral relativism I am not guided primarily by the intention of demonstrating how closing the books is not a viable policy option for a post-criminal society. The importance of such attitudes and strategies is more complex: they are rarely presented in purely consequentialist terms. Their proponents normally defend them by using distinctly moral categories. On this view, a proper look into the complexity of the context informs that it is morally right not to deal with past wrongs. The political argument of the vulnerability of a new democracy rests on the moral argument, which requires avoiding injustice being done to people who share group identity with perpetrators.

This is a wrong interpretation of practical morality. In my reading, both types of emotional reactive attitudes point to a special moral condition of the post-criminal society and all its members: while the former feelings are morally right, the latter are unjustifiable. We in whose name crimes are committed carry an extraordinarily heavy moral burden. Our moral condition requires some response through reflection and action. We are duty-bound to respond; we are responsible. Here is the claim: provided certain conditions are met, *all members* of a non-voluntary group in whose name mass crime is committed share responsibility for it. “Certain conditions” go beyond direct or indirect participation in wrongs. They point to a special case of mass crime, which I will call “collective crime.” Shared responsibility for collective crime requires specifying agency, that is, distinguishing among subgroups of actors, and establishing the criterion of the distribution of responsibility. This book’s special interest is with analytical and normative defense of arguments that purport to explain the reasons for, and the character of the responsibility of decent people. Those who did not intend, support, or commit wrong are still accountable in a non-vicarious manner. The basis of their responsibility is the crime-specific relationship between group identity and personal identity.

This account is neither communitarian nor relativist: it does not claim conceptual primacy of belonging, nor does it yield to determinism of culture. The argument will be liberal. Liberal intuitions may rebel: our personal worth should be assessed by what we do, and not by where we come from. However, this does not hold for the context shaped by collective crime. Liberally, a person’s identity is tainted by wrongs committed in his or her name. Then, it is each person’s duty to respond in a manner that will affirm his or her personal autonomy. My liberal identity is still defined by what I do, but I cannot freely choose the course of my action. Living up to the ideal of liberal autonomy requires that I reflect on the

context-specific moral burden of my group identity, and that I base my choice of action on that reflection. Let me go through this claim in some detail.

2

This is not a book about the past. Its topic is the present, or, more precisely, the time conventionally identified as the transition to democracy after mass, regime-sponsored crimes. In such societies, the recent past is deeply disturbing, marked by mass killing, torture, expulsion, destruction of property, and other forms of grave violations of human rights and denial of human dignity. The reason to take the time of transition as the vantage point in thinking about such wrongs may be obvious: the consequences of the sinister rule are most painfully felt immediately after the regime change. Individuals, groups, and society as a whole are under stress produced by the recent evil experiences. They are confronted with the question of how to relate to the crimes committed, promoted, or sponsored by the recently ousted regime. Or, the primary question could be whether legacies of such a past can—and, indeed, ought to—be overcome by reaching forward, or whether, for practical-political and normative reasons, they require looking back.

Let me outline the type of criminal past the legacies of which are in my focus. This book is about the moral consequences of, and special duties generated by a particular type of criminal regime and its practices. The regime will be identified as the *populist criminal regime*, and its practices as *collective crimes*. A detailed analysis is provided in Chapter One. Three criteria identify a populist criminal regime: first, the scope of the committed crimes; second, justification of criminal practice, and, in particular, the way of choosing its targets; third, normalization of criminal practice. Normalization has at least two important aspects. The first consists in the ideological, legal and political institutionalization of crime; the second of the regime and its practices enjoying the support of most of those subjects who belong to the group in whose name the regime rules. Crimes committed by such a regime can be identified as collective crimes. Collective crime is an act committed by a significant number of members of a group, in the name of all members of that group, with the support of the majority of group members, and against individuals targeted on the basis of their belonging to a different group.

Collective crime poses difficult questions. The scope and cruelty of atrocities and their consequences sometimes defy our capacity to compre-

hend. We may know the “historical facts” of what happened, but the character and the magnitude of wrongs committed are often such that we cannot—or, sometimes we even do not want to—come to terms with their full meaning. We are at unease, to such an extent that many among us seem to be compelled to turn our heads and repress our memories. This repression or preference for oblivion, works at both individual and group levels, and sometimes also finds expression on a political level. This is something that ought not to happen. We ought not to try to forget, close the books and look forward only, or to act as if nothing had happened that would deserve our lasting memory. This is not a mere statement of moral disgust in the face of recent evil. The position is analytically valid, or this shall be argued: the regime change does not bring the criminal past to an end. Criminal legacies are features of the post-criminal condition. The sinister past has not passed; rather, it has been integrated, in a particular way, into the transitional condition.

It is relatively easy to demonstrate that past injustices trouble everyone: both those who comprehend them in their full terror, and those who deny them; both victims and members of their group, on the one hand, and perpetrators and members of their group, on the other hand; both “ordinary people” who supported the old regime, and those morally virtuous persons who opposed it. It is however more difficult to comprehend what that trouble means, and how it could be understood and managed. A distinction between internal and external viewpoints could perhaps provide some help. External observers of a society burdened with the sinister past will probably agree that a broad confrontation with legacies of recent criminal events is necessary for citizens to regain capacity to live normal lives, and for the whole society to return to civilized normalcy. Such an insight will typically be based on a combination of moral and practical-political considerations. Still, this kind of consensus is less likely to be achieved in the affected society itself. Those who look at the troubled past from within are not merely spectators who learn about, try to understand, and come up with an evaluation of a disturbing practice. Everything that is at stake—transition to democracy, memory, responsibility, identity, justice, political stability, or normalcy of life in the future—is tainted by wrongs. The contemporary and future-related controversies stumble upon the issues of the past intentions, attitudes, actions and their consequences. Who we are and what we can and ought to do today, seems to be to an important degree dependent on who we were, what we did, or what we should have done yesterday. Yet, these insights do not automatically translate into the requirements for reflection and action. We indeed want

to overcome legacies of evil, in order to free ourselves of the lasting impact of their consequences. Still, while acknowledging the moral and political weight of the crime-specific challenges, we can perhaps argue that not dealing with them is the most effective way of overcoming them. A detailed analysis of this argument is offered in Chapters Two and Three.

I disagree with such reasoning. Departing from the definitions of the populist criminal regime and collective crime, let me specify the assumption that the criminal past matters in a manner requiring reflection and action. I will defend several broad claims. First, in difference to the considerations of political, legal, and economic obstacles to the democratic transition, criminal legacies cannot be overcome by future-oriented rational actions only. Second, collective crime leaves difficult moral traces on the post-criminal society and all its members, and for this reason “closing the books” on the past is neither a morally justifiable nor a politically feasible alternative. Third, post-criminal society, its political regime, and all its citizens are duty-bound to explicitly disassociate themselves from the evil past. Fourth, proper dealing with moral challenges imposed by past wrongs requires independence from forward-looking considerations of the democratic transition. In other words, dealing with the evil past ought to be conceptualized as an essentially backward-looking process. This is not a position of moralistic idealism, which would abandon contextual constraints and transition-related imperatives for the sake of some abstractly superior, holistic position: at stake is the re-conceptualization of the context. Fifth, this disassociation requires raising the question of moral responsibility. Sixth, the focus should be on collective moral responsibility—every person who belongs to the group in whose name mass crime was committed has a duty to take a reflective attitude and to respond to the crime.

These claims rest on the assumption of the moral relevance of collective crime. How can this relevance be specified? Criminal events matter for transitional society not only due to their proximity, or the nature of impediments they pose to the transitional process. What really affects us—psychologically, morally, culturally, politically—is the nature of past wrongs, and, in particular, the way they interrupt normalcy. The normalcy in question does not refer only to an intergenerational continuity of a group’s existence, nor to institutional and legal continuity of the political unit of which we are members, but rather to a certain minimum continuity of civility. Continuity of civility is shaped by uninterrupted validity of universal moral standards that form the basis for binding distinctions between right and wrong, good and bad, true and false, just and unjust, and

allowed and forbidden actions. The reference to “interrupted normalcy” does not mean that a populist criminal regime creates a condition in which moral distinctions do not matter anymore. Such regimes do not reject normative considerations as irrelevant. The insight of Joseph Raz that *every authority always claims to rule with right*² applies to criminal regimes in an especially brutal manner. Arguing that collective crimes interrupt the continuity of civility outlined by moral standards implies that these standards are perverted for justificatory purposes: one of the most troublesome features of these regimes consists in the legitimization of horrifying crimes by recourse to moral principles. Here is a simple equation: the more horrifying a criminal practice, the more it is presented in moral categories, by promoting ultimate moral wrong—killing and harming innocent persons—as the basic regime-specific standard of right and good.

Still, the initial objection holds: while we can perhaps easily agree that the past was morally wrong, nothing in the claims outlined above suggests that disturbing legacies indeed *have to be addressed* in the transitional process. The claim still awaits the support of sound arguments. In response, it is perhaps possible to depart from a strong normative intuition: there is something deeply upsetting in remaining indifferent to yesterday’s injustices. By staying silent, we send an implicit, but clear enough message to victims: their plight did not matter yesterday, and therefore it does not matter today. But, opponents of coming to terms with the past are likely to dismiss this as a moralistic obsession. For them, the best way to undo harm and injustice done to victims is to reintegrate their group into a new democratic community, by means of practicing democracy.

To repeat, I disagree with this view, which, from the viewpoint of victims, may even look cynical. Try the internal perspective: a crime was committed by some people with whom we share one of our important identities, with reference to that identity. When killing, some members of our social group acted in the name of all of us. Recall Nazi crimes, or crimes of Milosevic’s regime. When Nazis killed six million Jews and other “less worthy” people in Auschwitz, or when Serbian units killed more than 7,000 unarmed Bosniaks in Srebrenica, they had invoked the moral core of German and Serbian national identities, respectively. Such a perversion of the group-specific ethics cannot be simply abandoned as alien to us, Germans or Serbs of today. We need to ask what happened in our group, or what kind of transformation our identity underwent in the recent past, so that killing on our behalf could happen. More specifically:

² Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 23–37.

what led the majority of subjects of the criminal regime—most of whom behaved as decent human beings before the crime—to abandon basic moral standards, and support an alternative reading of the group ethics and collective identity, followed by acknowledging the new regime's legitimacy and the justifiability of its actions? Secondly, what is the relationship between the recently dominant criminal identity of our group, and our current democratic identity? For example, are we referring to the same nation when thinking about the Hitler-supporting German majority of June 1943, and the democracy-supporting German majority of June 1946? Note that the group is composed of largely the same people. Apparently, something strange happened to them: within a very short time they traveled from supporting the regime based on the ethics of evil (where the exclusion and killing of innocents were praised as virtues and freely accepted as moral duties), to the regime which requires recognition of human dignity and equal freedom for all.

This is a difficult question. Disciplines of history, sociology, political science, or social psychology are all heavily engaged in explaining this process. I will touch upon these insights, but my focus is on the question of justification. Specifically, I intend to explore the question of justified attitude to the past crime. Important as they are, answers to explanatory questions do not necessarily address morally relevant knowledge about crime. In Chapter One I will argue that collective crime is a fact the moral relevance of which is independent of the historical context that led to its coming into being. Killing, torturing, humiliating, or otherwise harming innocent persons, is objectively morally wrong, irrespective of any particular reason that may be advanced towards an explanation of what happened, or why, and how it happened. I take it as settled that crimes committed in Nazi Germany, on the territory of former Yugoslavia in the nineties, or in South Africa under the apartheid regime, are unjustifiable. This moral fact and the question of its impact provide the core themes of this book: departing from the empirical knowledge about atrocities, I inquire about its moral meaning and relevance in the post-criminal condition. The claim is that this moral fact demands response, not simply because we share group belonging with those who killed, but because those who killed did it in the name of our shared identity. The response should obtain the form of the context-specific moral duties.

Specificity of this moral condition means that in addressing the question of the right attitude to recent wrongs, at stake are not only individual or collective goals, intentions and actions, nor direct or indirect participation in blameworthy practices. The association with collective crime is

deeper—it is identity-based. Where does the requirement to acknowledge special duties we have as persons who share group identity with perpetrators point to? After collective crime, we, first of all, need to demonstrate that we deserve to be treated as moral individuals, that is, as decent human beings who are capable of living in accordance with accepted moral standards of right and just. This also applies to our group and our political community: our society should demonstrate readiness and capacity to organize its life together in accordance with moral universals, which recently have been violated in the most brutal manner. The two perspectives—individual and societal—cannot be neatly separated. I will argue that in the wake of collective crime the identity of the social group in whose name (in the name of whose members) atrocities were committed, becomes in a strong sense tainted by crime, to the extent that we can talk about crime-specific identity. This in turn permeates the condition of all group members. While dealing to some extent with perpetrators, collaborators, and bystanders, I remain focused on persons who are neither causally nor morally blameworthy. A decent member of the group the majority of whose fellow co-members have recently supported wrongs is not exempted of a share of being tainted on account of his or her decency. Personal decency confronts the morality of belonging, requiring that decent persons respond to the challenge the crime-tainted collective identity poses to their individual moral standing.

To repeat, the account is liberal. First, it focuses on the question of the meaning of personal autonomy in a particular context. Second, it does not specify a person's duty only by reference to the context-specific morality of belonging; when distributing the duty to respond and determining its character, it also takes into account the person's past attitude to the collective crime. Call this a position of socially mediated personal autonomy, where both "social" and "personal" are conditioned by crime. This is why we are all duty-bound to respond, albeit in ways that take into account our differing personal relations to crime.

3

Let me offer a summary account of the structure of the book. Chapter One (*Criminal Regime, Its Subjects, and Collective Crime*) is mostly analytical. The focus is on the elucidation of the character of the criminal past. Having outlined my understanding of the criminal regime and of mass crimes, I introduce and explain their particular subtypes, the legacies of which are subjects of normative analysis in the subsequent chapters: the

populist criminal regime and collective crimes. Specifically, I focus on the independent moral force of the fact of crime. This moral fact, I will argue, outlines the direction of the interpretation of the criminal past that a transitional society ought to take.

Chapters Two and Three examine the analytical accuracy and moral sustainability of arguments that favor closing the book on past wrongs. While I find these arguments wanting, in different ways, and for different reasons, I do not claim that they are trivial. Their relevance does not transpire only in the form of the empirical evidence that points to their widespread practical use. They offer many interesting analytical and normative arguments against an independent reading of the moral impact of crime. I distinguish among three broad types of such arguments: political, cultural, and analytic-philosophical. While this list is not exhaustive, I concentrate on these arguments because they all, albeit in different and sometimes covert ways, ask the question that is at the core of my interest—that of the morally right attitude to crime. I will argue that these arguments share a common mistake, which can be summarized as a wrong perception of crime. This is followed by politically, culturally, and morally wrong evaluations of, and wrong attitudes to, criminal legacies.

Chapter Two (*Politics of Silence and Denial*) explores political strategies that insist on minimizing the practical-political relevance of criminal legacies in the transitional period. There exist two basic approaches. The first acknowledges the fact of crime and its wrongness, but proceeds by arguing that analytical insights into the transitional condition require avoiding dealing with its legacies. I will distinguish between general and specific arguments of this approach. The general argument raises the claim of vulnerability of democracy. The three specific arguments derived from this claim are the protection of the core of collective identity; the unjust imposition of collective guilt; and unmasterable burden. A second strategy denies the wrongness of the crime altogether.

Chapter Three (*Culture, Knowledge, and Collective Crime: Reading Relativism*) departs from the insight that many political arguments against coming to terms with the past rely on culture-specific claims. Here I separate cultural considerations, to see whether they hold. The focus is on the critical analysis of the relativist position, according to which the character of the cultural context under the populist criminal regime absolves perpetrators, collaborators, and bystanders of any responsibility for collective crime. The core claim is that the populist regime and its practices rest on the culturally induced inability to judge and to act morally. The claim of the inability thesis is deterministic: the events and their outcomes—regrettable as they are—

could not have been avoided, given that the regime has effectively destroyed the agents' personal autonomy. I will bring together philosophical arguments of moral relativism and empirical arguments of cultural relativism. While this strategy may seem methodologically strange, I try to defend it by identifying a particular interplay between the two positions.

Having explored the arguments against dealing with the criminal past, in Chapter Four (*Moral Responsibility for Collective Crime*), I turn to the positive claim, to elucidate what I see as a proper response to the challenge of legacies of collective crime. The claim is simple: the character of collective crime requires acknowledging its moral impact. The focal point of acknowledgment is collective moral responsibility. Here is a summary of the argument.

The idea of collective moral responsibility rests on the thesis that all members of the group in whose name the collective crime was committed should be held accountable. In a more conventional preliminary reading, responsibility is, first, faculty of an agent without which there can be neither praise nor blame for what is done. Second, it is a set of conditions that determine the causal relationship between the agent, his or her actions, and the consequences of those actions, for which the agent can be justifiably rewarded or punished. A powerful objection against the concept of collective responsibility for collective crimes follows from here: how could someone who did not intend, support, or who did not participate in wrongdoing, that is, someone who did nothing legally punishable or morally wrong, be still held morally accountable?

I will claim that the nature of the evil past is such that it requires contextual rethinking of the concept of moral responsibility. The context requires going beyond the first person singular: the need to conceptualize collective responsibility follows from the character of the moral predicament, which affects individuals as group members. Therefore, a defensible notion of moral responsibility for such a past has to be built both upon an abstract knowledge of moral theory, and the conceptualization of wrongs we want to come to terms with. By introducing the category of collective moral responsibility, my primary aim is to offer a sustainable theoretical reflection of a particular difficult context. In this reflection, the "argument proceeds not from a general theory to particulars, but rather from an interpretation of our actual social, ethical and legal practices to a philosophical conception that explains, justifies, and criticizes those practices."³

³ Christopher Kutz, *Complicity. Ethics and Law for a Collective Age* (New York: Cambridge University Press, 2000), 12–13.

Specifically, I try to explicate the context-specific concept of *responsibility beyond causality and control*. The claim is that there can be situations in which each member of a collective can be held morally accountable, regardless of whether he or she contributed to an action and its consequences, regardless of his or her attitude to that action, and regardless of whether he or she was able to influence that action. The argument may depart by pointing to several insights, all of which concern the way in which the collective crime has become integrated into the individual identity of each member of the group: the collective crime was committed by some members of a social group, in the name of all members of that group; the crime was justified by reference to the core of the group identity: its alleged shared values, norms, traditions, and interests;⁴ this justification was accepted by the majority of the members of the perpetrators' group. Without this acceptance, the collective crime would not be possible at all. In the recent past we made a "contract of mutual indifference."⁵ We agreed, or at least we witnessed to a publicly made and implemented agreement that our world would start anew and that it would be based on two pillars: voluntary self-exemption of our group from the civilizational constraints, and the forced exclusion of the targeted group from our community, which was at the same time meant as their exclusion from the moral commonwealth of human beings, and, ultimately, their physical destruction. This all was done in the name of our group ethics. In consequence, the criminal practice gravely falsified and corrupted the group identity—at stake is the fall below a certain civilizational minimum, which in the practice of life together used to be known and accepted prior to the crime, that is, which the vast majority of the members of the group had already interiorized at the time of the crime.

This fall below the civilizational minimum directly targets the moral integrity of each member of the group. The foundation of my responsibility becomes the identity I share with the perpetrators. It is only by coincidence that I am a member of a non-voluntary social group (say, a nation), but the crime was consciously and systematically committed in my name. The contingent nature of my national identity is revoked by the intention and action of those who proclaimed my national name as the very reason for killing the people of another name. The ideological foundation, char-

⁴ David Cooper, "Responsibility and the 'System,'" in Peter French (ed.), *Individual and Collective Responsibility. Massacre at My Lai* (Cambridge, Mass.: Schenkman, 1972), 90.

⁵ Norman Geras, *The Contract of Mutual Indifference. Political Philosophy after the Holocaust* (London: Verso, 1998), 27.

acter and scope of the crime, all penetrate my individual identity. The fact that my inclusion in the ideological pattern of the crime rested on the ideological manipulation and an institutionalized lie, which I perhaps consistently opposed, does not suffice to exempt me from the duty to respond. Once the innocent people were killed, the lie expressed in my name has ceased to be a mere lie: it has become a fact. This is why the mere fact of my group identity yields my duty to acknowledge the injustice done, as well as the victims' right to demand from me an unambiguous, public demonstration of the rejection of the crime.

If this holds good, collective moral responsibility could be understood as the duty of all members of the group to take a moral stance towards the crime that was committed in their name. What "taking the stance" exactly means, will depend on where the person stood during the atrocities. But nobody is free from the sinister past. This "past that has not passed" defines moral position of each group member, by posing at least three broad requirements. First, we all have to reflect on recent wrongs, learn from own moral catastrophe, and find in these lessons the guidelines for re-shaping internal group relationships. Second, we are duty-bound to publicly acknowledge victims' suffering, to tell them that what happened was wrong and unjustifiable, and that we are sorry. Third, we should be able to demonstrate—as individuals, society, and polity—that we deserve to be granted one more chance to return to the civilized human community.

Chapter One

The Criminal Regime, its Subjects, and Collective Crime

1 Introduction

The central topic of this book is the distribution of responsibility among members of a social group in whose name mass crime was committed. Before addressing this question, a summary account of the criminal past is necessary.

This chapter comprises two sections. Section one provides a sketchy summary of issues that will be addressed in more detail in the subsequent chapters. It outlines the relationship between the past and the present, and distinguishes between the types of legacies of the criminal past after the regime change. A preliminary claim is that these legacies affect major identity levels—individual, group-specific, and communal. A related claim is that the questions of what can be done and what ought to be done with these legacies come down to the question of interpretation and evaluation of what has happened. The reference to interpretation informs that the past is not an “objective given,” the mastering of which would consist in merely grasping the factual features of yesterday’s events. But this does not imply that the meaning of the past is a matter either of social convention, or of unconstrained discursive preferences. The contours of a responsible interpretative enterprise are shaped by what happened. Hence, in section two I try to establish what exactly is the subject of interpretation: the central question here is analytical, and it asks what we have when we have the criminal regime and mass crimes. The focus is on the categories of the populist criminal regime and collective crimes.

2 The Challenge of the Disturbing Past

Past and present are temporal categories. The past is what is no more; the present is what is now. Still, these two temporal dimensions are often in a

relationship that questions their partition into these discrete realms. It is true that we who live today cannot directly experience the past; we cannot meet the people who are no more; we cannot participate in past events; we cannot change anything that happened before our time. But we can, and normally do learn about yesterday's processes, events, and their actors—call this historical knowledge. Besides, not every piece of historical knowledge is simply knowledge about things and people that do not matter anymore. We also learn about our past in order to see how it figures in our present: the relationship between two temporal dimensions is often one of continuity.

Consider the personal level. No one would ever think of oneself as a being constrained to here and now. *I was* yesterday, and *I am* today. If my selves of yesterday and today were fully separated, no identity talk would be meaningful at all. My self of today is importantly shaped by my past.

The same holds for intergenerational nonvoluntary groups, societies, or political communities: they are importantly constituted by their pasts. Individual, group-specific, and communal identities are possible only against the background of a fundamental continuity through time.¹ Sure, identity never implies statically perceived sameness. Present-day French society differs from the French society of 1789 or of 1940. Also, pointing to a “fundamental continuity” does not entail the view of an uninterrupted historic progress that would be free of breaks. Rather than standing for harmonious political, legal, moral, or cultural development through time, “fundamental continuity” only tells about the *identifiability* of a collective along the past–present line. The very existence of a particular society through time creates “common tradition, common activities, common interpretation, and common remembrance (and forgetting).”² In this sense, we can talk about a common culture, mediated by the collective memory and produced in the course of an intergenerationally understood life together. Though this relevant past is not necessarily harmonious and non-conflictual, we can perhaps claim that our life together has created a common denominator, through which we can evaluate our identities, relationships and the community in which we live. The assumption is that this common denominator (or, to use an expression of Jürgen Habermas, the “evaluative horizon”)³ is shared by *all of us* as members of a particular

¹ For a more detailed analysis, see Chapter Four.

² Janos Kis, “Beyond the Nation State,” *Social Research*, Vol. 63, No. 1, 1995, 236–237.

³ Jürgen Habermas, “The Nation, the Rule of Law, and Democracy,” in *The Inclusion of the Other* (Cambridge: Polity Press, 1998), 145.

social group, society, or citizens of a particular state, being at the same time exclusive *only to us*.

However, this assumption is not beyond reproach. Sometimes the things we did, or the things that happened to us, can cause deep conflicts, over both matters of knowledge and evaluation: what did really happen, who did it and how, was it right or wrong, good or bad, just or unjust? Such analytical and normative questions tend to outlive the events that caused them; they affect our culture, shared identity, or the way we perceive our future political constitution. The events of yesterday on which we disagree remain relevant as the source of challenges that affect us today: our conflicts over the past are often conflicts about our present and future.

The concern of this book is with such a conflictual relationship between past and present. I want to argue that the conflict imposed by a recent criminal practice affects all identity levels, from individual to communal. Under the previous regime mass crime was legally allowed, politically promoted, officially affirmed as morally right, and often supported by most of the subjects in whose name it had been committed. Then things changed. The society has undergone a regime change and has opened the process of democratic transition, explicating the intent to do away with the recent past. In legal, political, moral, and cultural terms, democratic transition is the beginning of a process of creating a new political community, fundamentally different from its criminal predecessor. The continuity of historical time has been broken. After the overthrow of such an oppressive, nondemocratic regime, people feel liberated from the past. The future they contemplate is not a mere temporal category: it rests on the promise of a new beginning that signifies a normative preference for a different polity. But as soon as we explicate our preference for a better future in the form of democracy based on human rights and the rule of law, we come to realize that the “better” in our image of the future can neither be defined nor built up as an absolute novelty, which would be independent of the circumstances of the post-regime change condition. A set of difficult questions transpires, answers to which should lead to an equally difficult choice, that of a right attitude to the past. Should we remember and take this memory as the basis for our—personal, cultural and political—attitudes and actions? Should we remember and decide to move the disturbing memory to museums and history books? Or, should we simply forget and focus on reaching forward?

This set of transitional predicaments tells that some “fundamental continuity” between the past and the present has remained. It can be observed

at two levels, empirical and normative. Empirical continuity concerns individual, group, and political agency. Individuals who were subjects of a criminal regime yesterday are supposed to become good citizens of a decent democratic polity today. A group on behalf of which atrocities were perpetrated remains identifiable as the group; the same holds for the targeted group, since even the worst mass crimes fail to destroy a whole group, that is, to annihilate all its members. Regardless of the regime transformation, the continuity of a political community remains. We identify the Third Reich and the Federal Republic of Germany as political regimes bound by political and historical ties that are relevant enough to allow raising the question of the appropriate political, legal, and moral attitudes of the present-day German democracy to German Nazism.

The normative aspect of fundamental continuity concerns the legacies of values that stood on the basis of the criminal regime and its practices. Referring to the normative continuity does not imply an unaltered status of the foundational moral precepts of yesterday. As we will see later, many people argue that with the breakdown of the criminal regime and the beginning of the process of the institutional design of democracy, old moral norms cease to be relevant. Still, at the very least, the idea of a normative clean sheet is not unambiguous, and its defenders have to prove its worth. This is so, because the claim of the irrelevance of the old values—even if defensible—does not entail the claim of their nonexistence. It would be difficult to argue that yesterday's willingly loyal subjects of a criminal regime have abandoned their old beliefs overnight, to smoothly embrace democratic values. Thus, the claim of the "clean-sheet" strategy is more modest: beliefs that have survived the regime change are not *publicly* relevant, meaning that the transition—as the process that establishes institutional and normative discontinuity—does not need separate dealing with the corrupt normative legacies. The argument is that the old values in question are rendered superfluous by the practice of the forward-reaching discontinuity, which here reads as the affirmation of a new normative system. I do not believe that this position is sustainable, for reasons I will explore in Chapters Two and Three. For now, it suffices to say that the existence of normative legacies after the change requires reflection about their significance, and that the practical-political interpretation of the transition's tasks will depend on the stance actors take on this question.

At this juncture, it may be useful to conceptualize legacies of the past found after the regime change, and to distinguish among their types. The regime change introduces elements of substantive novelty, both by bringing established political, societal, and cultural patterns to an end, and by

creating new patterns on the ruins of those delegitimized and destroyed. Of course, such a broad characterization applies to many very different political transformations, from democratic revolutions to anti-democratic coups. We characterize and classify these breaks more closely by exploring their ideologically proclaimed goals, effectively carried out actions, the scale and targets of violence used, the scope of social and institutional change they bring about, and the newly established status of the individual. But it is common to all such breaks that institutional and value patterns, actors and specific events, which used to shape our lives until the change, turn in its wake into a certain kind of the past we conventionally label legacies. The very use of the term “legacies” indicates that the old economic, political, cultural, ideological patterns may have ceased to be determining features of our new present, that organized actors may have been removed from the stage, that certain types of events are unlikely to be repeated, but that they are all, in a particular sense, still alive and powerful. It follows that we cannot simply disregard them. We need to understand the role they played in the recently delegitimized past. We need to comprehend the exact manner and shape in which they are present today. And we need to form a clear normative stance about them, so that we are able to prevent the resurgence of the founding values of the old regime. The goal of such an analysis of legacies would be practical: a post-criminal society has to establish whether political, legal, and cultural dealing with the criminal past should be on the agenda of its democratic transition.

It is possible to distinguish between “standard” legacies of the past, which are identifiable in all democratic transitions on the one hand, and the legacies of the criminal regime on the other. To the first group belong remnants of the old political, legal and economic institutional arrangements, their agents, as well as inherited cultural patterns. Political actors and scholars agree that these legacies present an obstacle to the process of democratization—it is their existence that has brought the theory and practice of transition to democracy into being. We talk about processes of transition and consolidation because democracy does not come to life by a simple act of dismantling the old regime, which would be followed by a conscious choice of democracy. True, we do decide that ours should be a democratic polity, or we “introduce democracy” through a series of important economic, political and legal reforms. Yet institutional design—even if smooth, efficient and consensually accepted—could be better and more cautiously understood as a framework necessary to work out our commitment to the process of democratization. This really is a matter of

common sense today: we do not usually deny that the past affects our societal, economic, and political concerns after the change. We also recognize the relevance of cultural constraints, as difficulties in establishing democratic political culture in a society whose members used to live and form their values and attitudes in a repressive, collectivist political and cultural context. In short, the past matters because the institutions, values, and patterns of action on which the constitution and reproduction of the old regime rested are alien to those of a democratic order. The regime change has delegitimized these old pillars to a certain non-negligible extent, but this does not equal doing away with them in a manner that would make room for a new beginning *ex nihilo*. “Standard” democratic transition has to look backward while reaching forward.

What has been said about the “standard” legacies with which transitions are confronted, also holds for post-criminal conditions. But there is more. Before proceeding to questions of how legacies of the criminal past can be determined and addressed, it is appropriate to specify their origin. The next section offers a typology of criminal regimes and mass crimes. Specifically, it introduces the category of collective crime, the legacies of which will be my central concern in this book.

3 Regime and its Subjects: Regime Crime and Collective Crime

After the regime change, people often argue about the past. Disagreements pertain both to facts and their interpretation: what really happened, why did it happen, who did it, and how, was it right or wrong, does it matter or does it not matter today? A closer look at these disputes reveals epistemological and methodological ambiguities in the conceptualization of knowledge about the past. Disciplines of history and philosophy of history have been marked by incessant disputes over the questions: “how do we know about the past, what historical causation is, how we define historical fact, is there such a thing as historical truth and objectivity?”⁴ Being focused on the post-criminal condition, I am not primarily interested in a factual or interpretative reconstruction of the past. For the purpose of my topic, two basic inferences about the nature of the past will suffice. While accepting the insight that there is no clear division between historical facts and their interpretation, I still hold that in all mass crimes one particular set of facts and one particular evaluative stance are beyond dispute.

⁴ Richard Evans, *In Defence of History* (London: Granta Books, 1997), 10.

First, at the level of facts, historically known cases of mass crimes—for instance, the Turkish massacre of Armenians, the Holocaust, repeated massacres in Indonesia, the Cambodian “killing fields,” slaughter in Rwanda, or mass murder in Srebrenica—all present clear instances of vast numbers of innocent people being killed. These empirical facts are beyond dispute.⁵ It can also be observed that in all these instances, the targets of mass crime were chosen on some ideological basis, be it racism, nationalism, or class belonging. This ideology identifies targeted victims as enemies, or less worthy human beings. Mass murder is complemented by other forms of violence. Those who are not killed, or those who are not killed yet, are denied the status of citizens and are forced to live in a condition of constant humiliation and fear, deprived of elementary security. One of the most important features of this condition is the denial of the protection of the state. The provisions of legal, political and social protection normally guaranteed by the state to all of its citizens, that citizens take as granted in normal situations, cease to apply to targeted people. The police do not protect them, and the judicial system does not recognize them as equals. Their property is considered free to be taken or destroyed. They are often deprived of the freedom of movement, they lose their jobs, they are denied access to education, proper social and health protection. Such people become outcasts, living or dying at the mercy of those who named them enemies.

Second, at the level of interpretation, I assume that a basic evaluation of such practices is beyond reproach: they were wrong, and none of them can be justified. Note how modest this normative claim is: it does not imply that the past is morally relevant for a society in transition; neither does it imply that the question of moral responsibility can be legitimately raised. As we will see in Chapter Three, it does not even imply that perpetrators are criminally accountable for crimes—at a normative level, there exists a distinct possibility to distinguish between the wrongness of an action and the blameworthiness of its agents. The normative concern of the right attitude to the recent crime, specifically the question of moral responsibility for it, provides for the central theme of this book.

But, in order to address this issue, I need to attend to the analytical question in some detail first: what do we have when we have mass atroci-

⁵ “Such ‘facts’ quite simply allow no interpretation, no meaning of the event at all [...]” – Christopher Browning, “German Memory, Judicial Interrogation, Historical Reconstruction,” in Saul Friedländer (ed.), *Probing the Limits of Representation. Nazism and the “Final Solution”* (Cambridge, Mass.: Harvard University Press, 1992), 30.

ties? Let me start with offering a list of features that analytically distinguish organized mass crime: ideological justification, especially the way ideology defines and singles out the targets of hatred; number of victims; the role of the regime in criminal practices; number of perpetrators and collaborators; beliefs, attitudes and behavior of “ordinary people.” A closer look at links among these features reveals that a conceptualization of mass crime requires a combined analysis of the nature of the regime, and the nature of the relationship between the regime and its subjects. Therefore, an identification of the criminal regime is at order.

I define a regime as criminal on the basis of three criteria. The first criterion is the character and scope of the perpetrated crimes: at stake are regime-sponsored mass atrocities committed against innocent people. The second criterion is the peculiar justification of criminal practice, especially the way of defending the choice of its targets. The third criterion is normalization of crime. This normalization can have two important aspects. The first consists in ideological, legal and political institutionalization of crime. The system of values, political arrangements, legal and cultural norms are all shaped in a manner that allows, justifies, and renders routine excluding from society, discriminating, harming, and killing those who are arbitrarily proclaimed as enemies. Institutionalization is sometimes formal, like in the case of Nazi Germany, where governmental arrangements, legal system, political organizations, and economic and cultural associations were established as instruments of the criminal practices. Alternatively, it can be informal, like in the case of the Serbian regime under Milosevic, where democratic institutions were created only to serve as a façade for the regime’s real working rules and the criminal practices based on the ideology of extreme nationalism.⁶ The second aspect of normalization—which I explore below—appears as the support of the majority of population for the regime and its practices.

While all criminal regimes commit mass crimes and provide an ideological justification for such actions, the criterion of normalization serves as the basis for a distinction between two types of such regimes, and two correspondent types of mass crime. I will distinguish between “repressive criminal regime” and its “regime crimes” on the one hand, and “populist criminal regime” and its “collective crimes” on the other. This distinction focuses on the complexity of agency. While the question of who partici-

⁶ For the distinction between formal and informal institutions, see: Peter Hall and Rosemary Taylor, “Political Science and the Three New Institutionalisms,” *Political Studies*, Vol. 44, No. 5, 1996, 936.

pated in a mass crime never stops with the identification of the direct perpetrators, the scope and the character of complicity in the two types of regimes differ substantially, reflecting two types of relationship between the regime and its subjects. In the first regime type, crimes are largely restricted to the actions of the regime, disapproved by a majority of the citizens who are, however, unable to oppose them. The latter regime type is distinguished by having the support of the majority for the crime. Put differently: while the repressive regime relies on institutional normalization of crime only, the populist regime includes majority support as well.

Before presenting this typology, two methodological disclaimers are at order. The first deals with the objections of empirical and conceptual inaccuracy in the offered distinction. The typology does not accommodate all the known cases of criminal regimes and mass crimes. Rather than belonging to one or the other type, many criminal regimes are likely to fall somewhere on the continuum between the two. Communist crimes, or post-civil war crimes under the Franco regime in Spain are cases in point. An additional problem concerns the fact that even in the regimes that fall neatly in one of the two categories, there is a non-negligible number of subjects who do not fit the description of the prevailing attitude. It is not immediately clear why such minority attitudes do not count in the typology.

Further, both designations may easily appear not merely imprecise, but even confusing. Does not every criminal regime rest on an unpredictable and arbitrary use of coercion? It can also safely be assumed that no criminal regime rests only on naked violence. If this is true, does it not follow that the identification of the first type is incomplete, because it refers only to the obvious, while at the same time disregarding the role of ideology? Similarly, the identification of the second type looks inaccurate, since its emphasis on wide-shared complicity fails to account for coercion directed against the subjects in whose name the regime commits atrocities.

My answer roughly follows Max Weber's methodological guidelines. The two types are indeed *constructs*, which do not aim at capturing reality as it stands. The goal is to conceptualize, that is to offer an interpretative understanding of the dominant subjective meaning that the actors—the regime and its subjects—attach to the criminal action. In a Weberian sense, then, the two types of criminal regime, and the corresponding types of crime, are ideal types of a common phenomenon,⁷ or abstractions that are necessary to understand a particular social action we identify as mass

⁷ Max Weber, *Economy and Society: An Outline of Interpretative Sociology, Part I* (Berkeley: University of California Press, 1978), 21–23.

crime. Explaining this requires addressing the second disclaimer, which argues that not all important features of mass crime are relevant for my point of view. Weber writes:

An ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct [...] ⁸

To formulate an ideal type does not mean to accurately represent, or replicate, a social action, or social reality of which that action is constitutive—such a positivist ambition is unattainable. An adequate interpretation discovers the meaning of the object of analysis by setting aside “indistinctness and ambiguity,” and by specifying the “manifold features, all of which are not found in each actual case.” ⁹

Following this methodological advice, the question of the choice of the relevant features of the object of analysis comes to the fore. Any serious reflection on the questions “why mass crime happened,” “how it happened,” and “who did it” requires careful historical explorations of each criminal regime and its practices. Deep controversies surrounding these questions are well known, and they are perhaps best illustrated by the academic disputes in the study of Nazi Germany and the Holocaust. The central issue is that of the causes of crime. Perhaps, as intentionalists argue, a particular atrocity was the outcome of a master plan that can be reconstructed by exploring ideology, attitudes, and actions of the regime. Hence, in answering the “why” question, it would be important to focus on leading personalities, that is, on political, economic, or cultural elites. A different stance views the decision to kill, and practice of killing, as emerging from a specific social and political dynamics, outlined by the interplay between institutions, organizations, social groups, and their ever-changing short-term interests and strategies—this is what structuralists would argue. It is also possible that the history of the relationship between the regime and the targeted group, or the history of the conflicts between social groups within a society, have to be taken into account. The latter often includes references to culture, mostly to historical continuity of attitudes of hatred directed against the targeted group, attitudes that—in some

⁸ Max Weber “Objectivity in Social Science and Social Policy” (1904), in Edward Shils and H. A. Finch (eds.), *The Methodology of the Social Sciences* (New York: Free Press, 1949), 90.

⁹ *Ibid.*

cases, and according to some authors—explain criminal practices. Additional methodological questions, like those dealing with dilemmas of historical objectivity and—more broadly—the very possibility and limits of historical knowledge, or those about the place of moral considerations in historical knowledge, also play a prominent role.

This is just a very rough and incomplete hint at different methodological approaches and understandings of mass atrocities. There exists a vast literature on these and related questions. But I believe it is possible to proceed without taking sides in these disputes. Specifically, in building my “ideal types,” I leave aside the question of the causes, that is, the question of *why* mass crime happened. To repeat, being interested in moral challenges of the post-criminal condition, I make two past-specific assumptions. First, it is known that atrocity happened; second, it cannot be justified. Having identified an event as a *moral fact*, I do not need to ask about its cause. Consider following facts of a relatively recent mass crime: in August 1995, thousands of innocent civilians were killed near the Bosnian town of Srebrenica; victims were Muslim Bosniaks; they were killed by the Serbian army. A comprehensive account of this event would indeed require exploring the question of whether the Serbian regimes in Bosnia and Serbia entered the war intending the genocide of the Bosnian Muslim population, or whether such an intention developed in the course of the social and political dynamics of the war years. Insights into the character of Yugoslav socialism and the cultural relations between the ethnic groups in Yugoslavia would also be necessary. But this analysis is not required for a moral evaluation: what happened was wrong, and no argument can be advanced to justify it.

This is not a descriptive approach that would simply state “what happened,” while stopping short of understanding. To repeat, in this book I hope to demonstrate that mine is an interpretative perspective that singles out morally relevant features of mass crime. Such a moral account requires an additional step in the direction of Weber’s “one-sided accentuation”: addressing the problem of agency as a particular aspect of the “*how* it happened” question. The question of “who did what” is pertinent both for the moral understanding of the event itself, and comprehension of the post-criminal moral condition. When addressing the question of how exactly regime crimes differ from collective crimes, focusing on agency reveals both analytical and normative distinctions.

3.1 REGIME CRIMES

The regime in which only the institutional aspect of normalization is present, could be called a “repressive criminal regime.” This regime does not count on its subjects’ approval of the criminal ideology and practices—the second aspect of normalization of crime is missing. Such a regime demands “mere” obedience, which is secured by the wide-scale, arbitrary and unpredictable threat and use of force. The goal is to bring those subjects who are not direct targets of crime into a state of submission, in order to prevent their resistance. So, with repression being the point of identification of these regimes, it is possible to distinguish violence against the targeted groups, and the threat of violence against the remaining majority of subjects. The goal is to eliminate the members of the first group, and to prevent members of the latter group both from opposing crimes, and joining the targeted group. Such regimes do have an ideology that makes references to “general interest” on behalf of which the rulers allegedly act, but this ideology is neither constitutive of the regime’s reproduction, nor is it shared by the subjects whose loyalty is demanded. The 20th-century military dictatorships in Latin America belong to this group. A pertinent example is provided by the so-called “dirty war” in Argentina during the reign of the military regime from 1976 to 1983.¹⁰

Crimes committed by this type of regime can be labeled *regime crimes*: ideology that justifies terror is not shared by a significant portion of population; victims are not perceived by the majority as legitimate targets of violence; a culture of complicity is absent; perpetrators and collaborators are relatively easily identifiable as members of the repressive apparatus. The central questions that will arise after the fall of this regime, in addition to criminal accountability, will be those of political and command responsibility.

Democratic transition after the fall of such a regime will have an important comparative advantage: new democratic elites and a majority of citizens will be united by a genuine negative attitude to the old regime, and the preference for a new beginning. This is so, because the repressive criminal regime and its acts do not leave legacies that would create a moral burden of blame on a new society, given that neither the new elite nor a majority of the people have shared the ideology that was used to justify the killing; and

¹⁰ See e.g., Marguerite Feitlowitz, *A Lexicon of Terror: Argentina and the Legacies of Torture* (New York: Oxford University Press, 1998); Carlos Santiago Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996).

they did not support the criminal acts. If and when a moral problem surfaces, it is most often a consequence of the balance of powers that has resulted from the character of the regime change. I will return to this problem in Chapter Two, when addressing the question of transitional justice. For now, let me just point out that this is not to argue that the moral challenges this type of transition is confronted with are necessarily light or readily manageable. But they emerge as, and remain primarily political questions to which an important moral dimension is added. The moral question is not created by what we did yesterday, or by what can be justifiably related to our group-specific identity. Rather, the question is transition-specific, since it seeks—in the context of forward-looking political concerns—for the morally appropriate way of treating clearly identifiable actors of the crime of yesterday. The question is one of disassociation from the crime by actors who neither committed nor supported it.

3.2 COLLECTIVE CRIMES

My focus is on the second regime type, which can be termed a “populist criminal regime.” It differs from the previous in that it relies on the support of the majority of its subjects, or more precisely, on the support of those subjects who belong to the group in whose name the regime rules. The essential quality of this relationship is not repression, but rather populist integration, which includes a high level of ideological and practical agreement about crime. Nazi Germany and Serbia under Milosevic’s rule are examples of this regime type, meaning that these regimes succeeded in attaining the voluntary loyalty of the majority of their subjects, which included the subject’s approval of crime. Such crimes then can be categorized as *collective crimes*. In this book, collective crime will be understood as an act committed by a significant number of members of a group, in the name of all members of that group, with the support of the majority of group members, and against individuals targeted on the basis of their belonging to a different group.¹¹

Collective crime cannot be committed by an individual, a random group, or a group perceived as a mere sum of its members. It presupposes the formation of common goals, the collective intention to perpetrate particular types of misdeeds, shared awareness about the nature of the intended misdeeds, coordinated efforts to realize the intention, that is,

¹¹ Linda Radzik, “Collective Responsibility and Duties to Respond,” *Social Theory and Practice*, Vol. 27, No. 3, 2001, 456.

shared participation in criminal action, and, finally, collective awareness about crime's consequences. Stating that goals, intentions, and actions can be collective, requires an appropriate conceptualization of social group. This question will be explored in detail in Chapter 4, where I will argue that membership in social groups is morally relevant, but that this claim does not imply a separate group agency. The focal category will be the group structure, understood as the stabilized interplay of interpersonal relationships. The argument of the relevance of the group structure will be based on the methodological position of socially mediated moral individualism. I will try to demonstrate that this position is capable of attending to the question of collective moral responsibility, and that it can also address the issue of distribution of responsibility among group members. For now, I only emphasize that nothing in the following account of collective crime assumes that all group members are equally blameworthy, or that they are all blameworthy. Registering the majority support for the regime and its actions as the crucial feature of collective crime points to dominant values, beliefs, and attitudes, and the way they are shared between the regime and the people on whose behalf it acts. This support comes into being in different ways and for different reasons: multiple motivations can be detected among the people who choose to participate in, or who approve of the criminal enterprise. As I indicated in the previous section, this "why" question is not thematized here, because it is not held relevant for the moral meaning of atrocities.¹² What is relevant for my question is the fact that approval assumes different forms, carrying a number of social and moral consequences.

But, before proceeding, it is important to mention the ambiguous status of coercion in the relationship between the regime and its supposedly loyal subjects. What has been said thus far does not imply that repression is not relevant. SA, SS, Gestapo, and other state agencies, in different ways, terrorized the German population. In a different, but still comparable manner, Milosevic's regime used multiple police units, paramilitary forces, criminals and state agencies, and even the Army, in its efforts to preserve the

¹² However, being aware of the increased relevance of proper understanding of the causes of mass crime in the transitional context, in Chapter Two and Three I address some particular interpretations of the reasons for which people supported atrocities. The focus will not be on discovering the causes of crime, but rather on assessing claims of cultural and moral relativism. These two, often closely related positions, offer peculiar reflections on the "why they did it" question. While not denying that atrocities were "objectively wrong," they typically argue that a proper discovery of reasons for wrong actions should lead to exculpating agents.

loyalty of the population in whose name it allegedly acted. Still, while the repressive regime is identified by distinguishing between two types of violence, directed against enemies and the majority respectively, the situation here is different. The populist regime starts with the affirmation of its exclusive ideology, and proceeds towards engaging in the most brutal atrocities against the targeted victim group, but the relationship to the group in whose name it acts is shaped by a combination of consent and coercion, where coercion is instrumental to the central goal of achieving approval.

Nazism intended to develop, groom, educate, and mold a new type of man, a man who did not need the power of the police or any other kind of *Anwendung von Zwang* (application of coercion) to make him conform to the norms of the state or of society. The type of person Nazism tried to create was one who would demand of himself to act, think, feel, and believe according to what the regime expected of him, or according to what he expected the regime might expect from him. The entire complex of ideological and normative expectations applying to a member of the Aryan race was to be internalized and acted upon by the individual as a matter of course, lest he lose his peace of mind. In the long run, instead of exercising violent power by means of police coercion, Nazism intended to indoctrinate its youth so that no external violence would be needed in order to ensure the faithfulness of the German, or, more precisely, his total identification with the state, the race, the Reich, and their culmination and essence: the Führer.¹³

The construction of collective crime unfolds in three stages, which, taken together, form a peculiar implicit pact between the regime and its subjects: the preparation of crime, criminal practice, and the joint approval of the crime's outcome and consequences.

3.2.1 *The preparation of collective crime*

While in both Germany and Serbia it is possible to identify elements of cultural prejudices against targeted groups existing before the advent of criminal regimes, those cultural traces were not dominant, and they alone cannot explain the formation of the consent, or subjects' actions.¹⁴ The importance of the existing cultural traits can be fully captured only if these

¹³ Uriel Tal, *Religion, Politics, and Ideology in the Third Reich. Selected Essays* (London: Frank Cass, 2003), 2.

¹⁴ Of course, differing accounts do exist. The most famous study that insists on the central importance of the cultural background for mass crime remains Daniel J. Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (New York: Alfred Knopf, 1996). This book is remarkable for its militant one-sided claim ("monocausal explanation"), according to which the single relevant and sufficient explanation of the Holocaust is the "eliminationist anti-Semitism" that—as the dominant cultural trait of German society—was in place before Hitler's rise to power.

are explored together with the processes of ideological radicalization that amounted to deep institutional changes, on the one hand, and a production of a new reality, on the other hand.¹⁵

Consider for instance one particular aspect of the regime's work—the exact identification of targets—, which invites the population to agree with a frighteningly arbitrary choice that aims at establishing a completely new reality. In Nazi Germany, once the ideology pointed to the Jews as the principal enemies, it had to be established exactly which people belonged to this group. Definition of the Jewish identity was a matter of a series of party proclamations, laws, and administrative decisions, passed in a process filled with problems, ambiguities, and controversies. Ideological and political dilemmas were to be resolved legally, in a complicated legal process in which it had to be decided who would live and who would die.¹⁶ The legal way out of the prolonged ideological and administrative confusion was formalized in the First Regulation to the Reich Citizenship Law (November, 1935).

Everyone was defined as a Jew who (1) descended from at least three Jewish grandparents (full Jews and three-quarter Jews) or (2) descended from two Jewish grandparents (half-Jews) and (a) belonged to the Jewish religious community on September 15, 1935, or joined the community on a subsequent date, or (b) was married to a Jewish person on September 15, 1935, or married on a subsequent date, or (c) was the offspring of a marriage contracted with a three-quarter or full Jew after the Law for the Protection of the German Blood and Honor had come into force (September 15, 1935), or (d) was the offspring of an extramarital relationship with a three-quarter or full Jew and was born out of wedlock after July 31, 1936.¹⁷

At work was a revolutionary project which aimed at, and which successfully carried out, the moral and institutional transformation of society.¹⁸

¹⁵ This complex approach to culture is exemplified, among others, by Saul Friedländer and Yehuda Bauer. See Saul Friedländer, *Nazi Germany and the Jews. Volume I: The Years of Persecution, 1933–1939* (New York: HarperCollins, 1997); Yehuda Bauer, *Rethinking the Holocaust* (New Haven: Yale University Press, 2001).

¹⁶ For a detailed analysis of this process, see Raul Hilberg, *The Destruction of the European Jews, Vol. 1*, Chapter Four, “Definition by Decree” (New York: Holmes & Meier, 1985), 69, *et passim*. Also Saul Friedländer, *Nazi Germany...*, Chapter Five, “The Spirit of Laws,” 145.

¹⁷ Hilberg, 72.

¹⁸ For the seminal study to use this approach to the subject, see Michael Burleigh, *The Third Reich. A New History* (New York: Hill and Wang, 2000), 219–281. For the Serbian case, see my “Continuity of Silence in Serbia: From the Irrelevance of Human Rights to Collective Crime, and Beyond,” in Gurinder Bhambra and Robbie Shilliam (eds.), *Silencing Human Rights, Critical Engagements with a Contested Project* (Houndmills: Palgrave Macmillan, 2009).

Ideological radicalization has two main features. First, as the above example of the construction of victims' identity shows, it aims at excluding targeted people from society. Before discussing the ways in which this goal is achieved, let me point to the second feature of ideological radicalization. It consists in forced re-socialization ("enculturation") of those who are chosen as future loyal subjects through measures of political and cultural propaganda:

The Nazi concept was systematically introduced into the existent society by the performance of novel, exciting and grandiose rites in public; by creating its own symbols; by tirelessly spreading its theories, convictions, and lofty goals; and by using any kind of communication to establish contact with population of all social strata.¹⁹

Such measures aim at integrating the subjects into an organic whole, within which any practical relevance of their personal autonomies will be effectively cancelled. The regime demands unconditional loyalty to the proclaimed ideological values, practical goals, and measures. This is institutionalized through legal, political, and cultural arrangements and norms that define binding distinctions between allowed and forbidden, good and bad, right and wrong, friend and foe. This should not be read as a mere lust for power. The requirement that the subjects consciously and unquestionably accept the regime's basis of legitimation, institutional patterns and practices informs that the consent of the governed is the core condition of the regime's reproduction. Hence, "normalization" at this stage consists in fulfilling a negative and a positive requirement. First, the majority should abandon basic moral principles, values, and norms that used to guide individual behavior and societal relations before the establishment of the new regime. I will offer a detailed analysis of the content of this requirement in Chapter Four. In essence, at stake is abandoning the interplay between universal moral values and group-specific ethics, in which the latter was considered legitimate to the extent it had been in accordance with the former. The positive requirement follows: the majority should accept as legitimate, and internalize, a new normative system designed by the regime, the system in which a new version of the group-specific ethics is imposed as obligatory. People should explicate their positive attitude by participating in regime-staged demonstrations of loyalty, by accepting their possible new social roles, by demonstrating their

¹⁹ Leni Yahil, "The Double Consciousness of the Nazi Mind and Practice," in David Bankier (ed.), *Probing the Depths of German Antisemitism. German Society and the Persecution of the Jews 1933–1941* (Jerusalem and New York: Yad Vashem, Leo Baeck Institute, Berghahn Books, 2000), 41.

“genuine acknowledgment” of the new ideology, by using and expressly holding up to new symbols, and by disassociating themselves—in both public and private life—from those who are named enemies.

This all leads to a new type of normalcy. It is useful to distinguish between public and private normalcy under criminal regime, both of which will have a crucial role once the killing unfolds. Of course, the term “public” applies only conditionally, and with a very specific meaning, which has nothing to do with a democratic understanding of public sphere. It is a “staged, controlled, and manipulated public sphere [...] the task of which was to reproduce the leading images and patterns of meaning created by the regime, a space in which subjects would demonstrate acclamatory consent with the regime policies.”²⁰ Still, it is a distinct field, in which the regime outlines contours of the new culture of political normalcy, and creates specific expectations for the subjects to fulfill:

The Nazis invested much effort in capturing the public sphere through their rituals and symbols: first, on special occasions, through street decorations for Nazi holidays, and through the symbolic “orientations” of masses at rallies and marches; second, through redesigning public spaces by means of imperial architecture, which was supposed to permanently contribute to the formation of people’s attitudes. Besides, the regime demanded that in their everyday lives, people follow certain patterns of behavior, which would have the meaning of demonstrating their public support for the regime: wearing insignia and uniforms, using the officially required “Hitler-greeting,” hoisting swastika flags, being obliged to attend and listen to public radio transmissions of party rallies, giving money contributions to street collectors, and so on.²¹

At the same time, and perhaps more controversially, the German and Serbian regimes were careful to avoid destroying all the existing cultural patterns of the nation. While “public life” was under constant revolutionary stress, the “private version” of the new normalcy was focused on the preservation of stability. The *mores* of social and, especially, family life were upheld, having been re-interpreted as the core features of the true national or racial spirit. More precisely, these regimes based their legitimacy on their self-assigned status of the liberator of the genuine group-specific ethics.

Consenting subjects, together with “their” regime, build a new form of unity, which acquires an important religious dimension:

What has brought into being the National Socialist movement is the yearning for a true communion of the German people [...] This movement offers us something that cannot

²⁰ Peter Longerich, *Davon haben wir nicht gewußt! Die Deutschen und die Juden Verfolgung 1933–1945* (Munich: Siedler, 2006), 24.

²¹ *Ibid.*

be expressed in words, but only felt [...] Fate has set before us a great task, to remove the root of the German people's misery: inner strife.²²

Faith and nation create a man and create people, their soul, their essence, their identity, their being. If you change your faith, you lose yourself, that is, you kill yourself.²³

This unity is prescribed by the ruling ideology as the finally achieved freedom for an organically perceived group, freedom that is guaranteed to all group members, provided they accept the new definition of reality as the normative basis of their existence and as the guideline for their actions. The Nazi regime reinvented *die Volksgemeinschaft*, while in Serbia Milosevic's regime operated with the concept of "Serbdom"; both were understood in terms of racial and national purity. "Purity" is not only a leading ideological category. It is also a practical goal: the intention is to establish a society which will be composed of nobody but the members of the chosen group; the state is to become a home of those whose name it bears (Germany to the Germans; Serbia to the Serbs). Given that their unity is a valued practical goal, and that by definition they can be united only with those of their kind, the chosen ones are duty-bound to achieve purity. "After genocide and [...] after the Constitution of 1974, it is difficult to understand why Serbs today do not strive rationally and persistently for a state without the national question, without inter-ethnic hatred, without Serbophobia."²⁴

The "national question" empirically reads as the presence of ethnic plurality. In normative terms the "national question" indicates that ethnic plurality is something undesirable: "inter-ethnic hatred" and "Serbophobia" are alleged as historical inferences proving that the only rational way of dealing with the empirical condition of ethnic plurality consists in overcoming it. Life together in harmonious unity is possible only as life without those who have hated us: achieving purity is justified by the particular ideological ingredient of self-victimization. Ideology starts as a mythologized political discourse, which teaches that "Aryans are the only true people," or that Serbs are "the oldest people in Europe," "glorious in their uniqueness." Still, members should accept cults of death and martyrdom, the epics of betrayal and defeat as their primary virtues. But once "the

²² Hitler's speech at the first NSDAP rally in Nürnberg after the seizure of power, September 1933; quoted after Tal, 31.

²³ Radomir Lukic, Professor of Law and member of the Serbian Academy of Sciences and Arts, *Politika daily* (Belgrade), June 28, 1989.

²⁴ Dobrica Cosic, writer, labeled "the Father of the Nation" by followers, later (1992–1993) the first President of "rump-Yugoslavia" (Serbia and Montenegro); *Knjizevne Novine* weekly (Belgrade), 15/07/1989.

holy right to restore the lost dignity” by means of retaliating for “innocent victims” of the past is introduced, the rationale of self-victimization becomes transparent. The principal culprits for the past continuity of suffering and injustice are identified, and it is thanks to the new regime that these groups are today finally publicly disclosed as the enemies against whom we must unite, to achieve victory, once and forever. In this ideology, victory equals justice. Participation in this process is portrayed as the highest patriotic duty.

Exploring the German case, Saul Friedländer uses the term “redemptive anti-Semitism,”²⁵ to show that this ideology presents the onslaught on Jews in terms of salvation.

We return to the past in order to build once and for all a new future [...] We return to our roots, to the roots of the Germanic man, to the roots that shape our destiny and that therefore are our God, our *Reich*. We are called to bring about an eternal unity, a unity of blood and soil, soil and nation, nation and race, race and God that is our Reich [...] It is the Jew and Judaized Europe with its incurable diseases such as weakening Christianity, corrupt Marxism, that are the contradiction per se; therefore the Jew is the main obstacle for the fulfillment of our global and historical mission [...] The purification of our *Folksoul* can be attained only by curing our sick mind and body from the diseases caused by Jewish contamination [...] one of which is the self-alienation of the German from his Germanic history [...] Only by regaining our Germanic self-identity shall we emerge as victors out of the struggle for survival.²⁶

The Serbian version of the ideology that justifies hatred by invoking self-victimization is perhaps best summarized as “resentment nationalism,”²⁷ centered around analytically meaningless but ideologically powerful concept of Serbian martyrdom in Yugoslavia.

The nation which, after long and bloody struggles, finally regained its own state, which was able to build civic democracy without help of others, which in the two world wars lost 2,5 million of its compatriots [...] is after the four decades the only nation in Yugoslavia without its own state. It is not possible to imagine worse historical defeat in peace [...] In less than fifty years, for two successive generations, the Serbs were twice subjected to physical annihilation, forced assimilation, conversion to different religion, cultural genocide, ideological indoctrination, denigration and compulsion to renounce their own traditions because of an imposed guilt complex. Intellectually and political unmanned, the Serbian nation has had to bear trials and tribulations that are too severe not to leave deep scars in their psyche, and at the close of this century of great technological feats of the human mind, this fact must not be ignored. If they want

²⁵ Friedländer, *Nazi Germany*, 86–87.

²⁶ Gottfried Griesmayr: *Das Mysterium des Blutes*, 1939; quoted after Tal, 33

²⁷ Vesna Pesic, “War for Ethnic States,” in Nebojsa Popov (ed.), *The Road to War in Serbia. Trauma and Catharsis* (Budapest, CEU Press, 2000), 28–39.

to have a future in the family of cultured and civilized nations of the world, the Serbian people must be allowed to find themselves again and become an historical personality in their own right, to regain a sense of their historical and spiritual being, to make a clear assessment of their economic and cultural interests, to devise a modern social and national programme which will inspire present generations and generations to come.²⁸

Nazi “redemptive anti-Semitism” and Serbian “resentment nationalism” reveal that the regime-sponsored “ethical emancipation” amounts to the creation of a peculiar new normative system. At its heart this is not the defense or re-affirmation of the “essence of the group identity,” but rather the ethical act of elimination from the community of equals of those who are named enemies. What makes exclusion ethical? New normalcy centers around the identification of Jews or non-Serbs as morally less worthy human beings. The process that will culminate in mass killing begins with the ideology that offers moral justification for the exclusion from the moral commonwealth. Discrimination, segregation, humiliation, and mass abuse are all ethically grounded practices. Finally, killing itself is the fulfillment of the highest moral duty. Call it ethics of evil.²⁹ This criminal treatment of targeted victims is the place where public and private normalcy meet. In public and private domains alike, the new ethics turns the old morality, with its distinctions between right and wrong, good and bad, true and false upside-down. All these categories remain, but now the valid meaning of the right, good, or true applies to beliefs, attitudes, and actions that are in decent societies considered as wrong, bad, or false. At the same time, internal group relationships remain based on the ethical standards of the good. This is sometimes called the “double (divided) consciousness”³⁰: while denying recognition and excluding, harming, killing non-

²⁸ This is an excerpt from the *Memorandum of SANU*, a document prepared in 1986 by some of the leading Serbian intellectuals gathered around the Serbian Academy of Sciences and Arts. Immediately upon publication, this text provoked strong excitement among Serbian nationalists. It was praised as the long awaited articulation of the voice against the oppression of the Serbian people in Yugoslavia, and as the first great step toward putting the “Serbian question” on the political agenda, with the aim to “return lost dignity” of the nation. Slobodan Milosevic supported this document, thus signaling his intentions, and entering into an open conflict with those who criticized Serbian nationalism. By today, the *Memorandum* has already acquired the status of a national myth, being referred to by many as the “finally articulated” Serbian national program. This quotation is from the Academy’s own English-language translation: Kosta Miha-jlovic and Vasilije Krestic (eds.), *Memorandum of the Serbian Academy of Sciences and Arts. Answers to Criticisms* (Belgrade: SANU), 1995, 133, 138.

²⁹ For a more detailed analysis of ethics of evil, see Chapter Four.

³⁰ Yahil, 41.

Serbs or non-Germans is seen as morally non-problematic, treating fellow Serbs or Germans with heightened special care remains as a normative requirement of decency.

Stabilization and broad acceptance of this normative system ultimately aims at creating a condition in which subjects would abandon humanity,³¹ and accept new values and correspondent practices without registering a moral problem. Achieving such a goal is a process rather than a straight outcome of the establishment of the criminal regime: "This consensus took many forms, and was fluid rather than firm, active rather than passive, differently constituted according to context and theme, and constantly in the process of being formed."³² In the following sub-section I follow further the dynamics of this process.

3.2.2 *Criminal action*

The second stage of collective crime consists of criminal action. Historical knowledge informs that criminal regimes carefully prepare and coordinate the execution of crimes. The murky rationality of this project implies devising and carrying out a peculiar "division of labor." It exists at two levels: participating in crime, and supporting crime. Direct participation relies on a "highly differentiated structure of institutional and individual actors,"³³ carried out under firm control of the central party-state apparatus. It involves issuing of political and military orders by leaders and commanders, committing of atrocities by perpetrators, and help for criminal actions by collaborators. Acts of direct participation are identifiable as legally defined crimes. But they do not suffice to fully encompass criminal action.³⁴ Focusing on criminal justice exclusively fails to obtain a clear picture of society in which the most drastic violations of human rights were made possible

³¹ Heide Gerstenberger, "Acquiescence?" in Bankier (ed.), 29.

³² Robert Gellately, *Backing Hitler: Consent and Coercion in Nazi Germany* (New York: Oxford University Press, 2001), 2.

³³ Jörg Raab, "More than Just a Metaphor: The Network Concept and Its Potential in Holocaust Research," in Gerald Feldman and Wolfgang Seibel (eds.), *Networks of Nazi Persecution. Bureaucracy, Business, and the Organization of the Holocaust* (New York: Berghahn Books, 2005), 321.

³⁴ "[...] Those who defined what could be done at any particular stage in the first place were not the Nazi politicians, but the academic experts: population statisticians, labour scientists and nutritionists, anthropologists, human geneticists, physicians and the other experts of a modern industrial civilization." – Norbert Frei, "People's Community and War: Hitler's Popular Support," in Hans Mommsen (ed.), *The Third Reich Between Vision and Reality. New Perspectives on German History 1918–1945* (Oxford: Berg, 2001), 68.

through broad endorsement of a perverted value system, and through the complicity, collaboration, or “passive support” of many, ranging from those at the top of power to “ordinary people.”³⁵ Perpetrators and collaborators act not in their own name only, but in the name of the whole group. Causal agents’ ascription of the criminal purpose, intention and action to all group members is the constitutive feature of this type of crime. Those who join for the criminal purpose, who formulate and spread criminal intention and who engage in criminal acts will justify each of their steps by invoking the identity of the whole group and some alleged good for each of its members. In order for the proclaimed good to be legitimized as “real,” subjects have to demonstrate acquiescence with it: both the formulation of criminal intentions, and the manner of their realization count on different forms of support from the subjects. When the killing starts, they will be expected to demonstrate a specific kind of moral loyalty, which would be manifested as an attitude that says: whatever the regime is involved in, and whatever its subjects act as accomplices to, is politically justifiable and morally right.

This does not imply uniformity of the population’s beliefs, attitudes, or behavior. The relationship of the “ordinary people” to crimes, perpetrators, and victims, can be very different, serving as the basis for the identification of subgroups among the subjects. First, some people will be disapproving of crime; however, given the character of the unity requirement imposed by the regime, they will seldom perceive expressing dissent or helping victims as viable strategies: risk, summarized as the threat of the regime’s retaliation in the case of disobedience, is too high. Second, some people will prefer not to reflect on what has been happening around them, trying hard instead to preserve the illusion of the old private normalcy; such an attitude is sometimes described by using a somewhat stylized term “inner emigration.” Third, some people will expressly support the regime not because they would be stanch fanatics, racists or nationalists, who truly believe the truth of the regime’s assertions and policies. It is possible to identify different incentives for loyalty within this subgroup: some may find it rational to be loyal because of their narrow interests; some may prefer conformism to critical reflection; some may believe that loyalty to one’s state is an unquestionable duty regardless of the character of the regime; some may be pervaded by fear, seeing no alternative to the pretence of enthusiastic obedience. Fourth, some people will misread the regime ideology and policies: they will support the regime because they believe that it does good to their group, for instance

³⁵ David Dyzenhaus, “Justifying the Truth and Reconciliation Commission,” *Journal of Political Philosophy*, Vol. 8, No. 4, 2000, 473.

by overcoming a long tradition of injustices inflicted on the group, or by improving the social and economic condition of society. Finally, some people are indeed extremist racists or nationalists, and they will support crime following their wicked but genuine normative convictions.

In Chapters Two and Three I will demonstrate how such plurality of attitudes and motivations of obedience—including the perceived lack of choice, interest, conformism, fear, cultural patterns of obedience, and perverted moral conviction—matters in the assessment of individual responsibility after the regime change. But, this attitudinal and motivational plurality does not provide a decisive case against the designation of a criminal regime as a populist one. Consequently, it does not preclude collective moral responsibility: the fact of this plurality does not speak against the ascription of some special duties to all group members, including those who are not morally blameworthy. The claim, already outlined above, is as follows: unforced collective loyalty can be identified as morally unjustifiable, although the agents' motivations for obedience do not always meet the regime's stated expectations. This claim is based on two arguments.

The first argument is normative, and it provides an answer to the question of focal point in thinking about populist criminal regimes and collective crimes. To repeat, it is possible to develop different methodologically sound concepts and approaches for research of state sponsored atrocities. My normative position is simple, and it consists of a negative and a positive claim. In negative terms, when establishing the nature of a regime that commits collective crime, we do not need to start by exploring causes of attitudes and beliefs of their subjects. For my purpose, it is not important to establish what most of Serbs or Germans really thought about Milosevic or Hitler, or why they supported these regimes and their criminal actions. In positive terms, the vantage point consists in acknowledging the fact of killing of innocent people. The question to ask is how people behaved in different stages of the regime: how they behaved when extremists were coming to power, when they established the new regime, and when they engaged in atrocities. In assessing each of these steps, we keep focus on the perspective of victims, because theirs was the experience of the ultimate horror.³⁶ We

³⁶ I reject the claim that we “cannot know” how it was to be a victim, given that we did not share this experience. Those who simply claim this, and those go at great lengths to advance “sophisticated” theoretical arguments for such an assertion, can perhaps sit through nine hours of Claude Lanzmann’s film *Shoah*. Or, they can read testimonies collected in Lina Vuskovic, Zorica Trifunovic (eds.), *Women’s Side of the War* (Belgrade: Women in Black, 2008).

have to ask whether the majority considered the plight of victims as an important point of orientation when making their choices. Here is, then, the core of the moral question pertaining to mass crime:

To be “inside the moral” is to have an interest in superfluous evils others suffer from, but also an interest in the production and distribution of these evils. A moral action is dead set on disrupting these orders so as to lessen the evils and reduce their harm.³⁷

Once we look at the predicament of “ordinary loyal people” from the perspective of all those innocent human beings tortured, humiliated, and killed in the most brutal ways—this all in the name of “ordinary loyal people”—the central question becomes not whether the majority “really believed” the truth of the ruling ideology, nor whether they “genuinely supported” crime. The question is whether they were morally indifferent or not. The empirical fact of unforced loyalty is enough to establish the moral fact of indifference, which in turn suffices for the identification of a populist criminal regime. The preference of “ordinary people” for “life as usual” in an extraordinary context cannot be justified, regardless of reasons they advance for such an attitude.

This normative argument, which interprets unforced loyalty as moral indifference, is not enough. The second argument, then, has to be analytical, and it has to render precise the meaning of loyalty. In particular, what is the analytical status of the plurality of motivations, which the normative argument disregards as morally irrelevant? A simple answer could be that it is only actions, and not motivations, that count. But this is not accurate. Individual motivations do matter, especially for establishing whose (non-)actions can be judged as morally blameworthy. People can support the regime, or remain passive, either for justifiable or for unjustifiable reasons. This distinction is certainly morally important when we think about individual responsibilities. Still, the support for the regime is a *social practice* rather than a simple outcome of the sum of individual motivations and attitudes. At the political level, loyalty, regardless of its multiple reasons, obtains an independent quality. This does not imply that morality is a social construct which would deny moral autonomy of individuals. Rather, at work is a peculiar interaction: the majority of subjects are for different reasons loyal to the regime, while *only this loyalty* makes it possible for the regime to commit atrocities:

³⁷ Adi Ophir, *The Order of Evils. Toward an Ontology of Morals* (New York: Zone Books, 2005), 12–13.

Continuation of the usual practices of everyday life did not simply happen, it was the result of collective behavior [...] It did not only produce the conditions for the governing of the German population, it also provided the legitimation for those who refrained from publicly voicing dissent.³⁸

Subjects, who for different reasons choose to be loyal, contribute—even if it is not their intention—to a peculiar ideological construction of reality. In the perspective of the regime’s preferences, their loyalty has a double meaning. First, it confirms the validity of the new normative system imposed by the revolutionary ideological engineers. Second, it makes it possible for the regime to claim the subjects’ support for the atrocities it commits. It is less important whether a sociological analysis would demonstrate that people were genuinely committed to the regime’s cause, or that, conversely, they were motivated by some other reasons. As long as it can be proven that their loyalty was unforced, we have a case of the regime that relies on the support of its subjects. Without such empirically observable loyalty, the mass crime would immediately be exposed as a blatant barbarian practice for which no public justification can be advanced. Loyalty offers the practical affirmation of the worst lie—that innocents are not innocent, and that they therefore deserve to be killed. In this regard, Hitler was frighteningly right: “The value of people and their value for the *Volksgemeinschaft* is defined only by their way of performing the work which they have been told to do.”³⁹

“The work which they have been told to do” ultimately comes down to different forms of the support for, and the approval of, the regime-orchestrated atrocities—this is why I use the term “collective crime.” Loyalty, support and approval, do not imply that the majority of subjects share the ethics of hatred against a group of innocent co-citizens and fellow human beings formulated by the elite. These attitudes do however entail a fundamental agreement with practices of crime.⁴⁰ In the light of this agreement, a possible ideological disagreement ceases to be relevant. Given that the regime justifies crime in ethical terms principally, loyalty to the regime means approval of the ethical justification of crimes the regime provides. Assume that I live my everyday life of a subject of the Serbian nationalist regime in “inner emigration.” I try to keep distance

³⁸ Gerstenberger, 34.

³⁹ Quoted after Frei, 62.

⁴⁰ For empirical evidence, see, for example, Klaus Wiegrefe, “Die große Gier,” in Stefan Aust, Gerhard Spörl (eds.), *Die Gegenwart der Vergangenheit. Die lange Schatten des Dritten Reichs* (Reinbeck bei Hamburg: Rowohlt), 226.

from the “public sphere” in which strong pressure is exercised, demanding approval of the regime’s actions. I obey the laws that regulate my private status, seeing this as a necessary concession for my effective disassociation from the regime. I pay taxes not because I would expect something in return from the regime, nor because I would see it as my small contribution to the regime’s cause, but because this increases the likelihood of the regime leaving me alone. I obey the Criminal Code not because I approve of the regime’s legally sanctioned crimes, but because this Code still formalizes some moral guidelines I value highly: it forbids killing, harming, and stealing, even if these norms are valid only for those who are not legally excluded from the political community.

On the one hand, this kind of reasoning can easily be refuted by the “blood money” argument. Taxes which I pay to buy my peace are used to finance the military machinery, or the concentration camps. The Criminal Code that meets some of my moral expectations excludes some people from its range of protection, turning them into “legitimate” targets of crime. This would be a consequentialist moral reading: the basis of my moral responsibility is the insight that my benefits are possible only at the expense of someone else’s plight.⁴¹ It is certainly an important consideration: when striving to make my life better, I have a duty to observe that my betterment does not harm other people. Money stained with other people’s blood makes my hands dirty. But there is more. The moral wrongness of my judgment is independent of whether I intended to achieve benefit from my loyalty or not, or whether I actually achieved benefit or not. Following my knowledge about the nature of the regime and its actions, loyalty itself becomes a moral fact:

National Socialist Germany was ruled by a criminal, murderous regime, and the day-to-day life of its citizens was colored by this, even in the most trivial circumstances. Social welfare, medicine, neighborly relations and so on took place in the framework of a regime devoted to murder and genocide, and when you describe the *Alltag* without reference to that, you are in danger of trivialization of what should never be trivialized. In other words, there is a moral problem here.⁴²

It is against this background that different (non-)actions of the subjects on the continuum between consent and passivity should be evaluated. For

⁴¹ For a critical analysis of this view, see Linda Radzik, “Collective Responsibility and Duties to Respond,” *Social Theory and Practice*, Vol. 27, No. 3, 2001, 457–458. See also Chapter Four.

⁴² Yehuda Bauer, “Overall Explanations, German Society and the Jews or: Some Thoughts about Context,” in Bankier (ed.), 16.

instance, there is much disagreement on the question of assessing the state of German public opinion under Nazism. Still, the existing empirical data makes it clear that the regime never achieved the desired full correspondence between the official ideology and the people's opinion. It is well documented how sensitive the regime was about popular mood. The party, the police, regional and local authorities, collected reports that were carefully explored at a national level.⁴³ The signs of disapproval were many, which was further confirmed by reports of the German Social Democratic Party in exile (*Sopade Berichte*).⁴⁴ But, apart from the inherent limitations of these reports that prevent any statistically based general conclusions about the population's attitudes,⁴⁵ it has been observed that people protested against acts of violence, but not against the new position of the Jewish people. What bothered them was the violent disruption of order, rather than acts of discrimination against non-Aryans. While the regime-staged boycott of the Jewish stores on April 1, 1933, was met with much disapproval, the April 1933 Law for the Restoration of the Public Civil Service, which instituted "racial purity" as a condition for employment, leading to the elimination of thousands of Jews from the civil service, was met with much support, and with practically no voice of dissent.⁴⁶ This is the case of loyalty *qua* moral indifference: the population is concerned with the preservation of "normalcy," while the "lawful" terror against the chosen enemy leaves it largely unmoved.⁴⁷

This will become even more striking when the dynamics of the terror develops towards mass killing: the beginning of the war coincided with the beginning of the most brutal phase of the "final solution." But, daily terror against the Jews, their mass disappearance and public deportations

⁴³ Otto Dov Kulka, "The German Population and the Jews: State of Research and New Perspectives," in Bankier (ed.), 271–272.

⁴⁴ The full text of the Sopade reports is available at *Sozialistische Mitteilungen*, Ungekürzte Online-Ausgabe, <http://library.fes.de/fulltext/sozmit/som-b-index.htm>.

⁴⁵ Eric Johnson and Karl-Heinz Reuband, *What We Knew. Terror, Mass Murder, and Everyday Life in Nazi Germany* (Cambridge, Mass.: Basic Books, 2005), 326–327.

⁴⁶ David Bankier, *The Germans and the Final Solution. Public Opinion under Nazism* (Oxford: Blackwell, 1996), 68.

⁴⁷ "Much of the population viewed the racial legislation as a possible permanent solution of social, cultural and biological segregation and isolation, but conditional on the preservation of public law and order [...] Another segment of the population whose weight and standing on the social and political map are difficult to assess — apparently took no position on the Jewish issue. Some of their reactions, though certainly, not the majority, derived from an attitude of passivity or equanimity toward the regime's ideology and policy in general." — Dov Kulka, 273–274.

attracted very little interest. At work was essentially the adjustment of moral indifference to a new context. Before the war, most of the people preferred “life as usual,” which was often bringing them important social benefits; many rejected open violence against the Jews as a disruption of normalcy. Once the war started, moral indifference reached a new level; the subjects did not consider a preservation of a semblance of “law and order” as relevant anymore. The majority may not have known about Auschwitz, but everyone knew that something terrible was happening to the Jews. However, most of the ordinary Germans did not care.⁴⁸

Finally, returning to the question of the criminal division of labor, let me mention that bystanders’ loyalty is not a uniform task. Until now I was mainly focused on the attitudes and actions of individual subjects. But the exact character of the expected loyalty chiefly depends on the pre-criminal distribution of social roles. Leaving aside the question of whether and how membership in a group or an institution shapes a person’s ethical independence,⁴⁹ I here just note that belonging raises both capacities for acting and stakes of a possible non-action. Typically, regime’s requirements will also be differentiated, depending on the social status of the addressees. A populist criminal regime will demand from institutions and their members a combination of the support for crime on the one hand, and engagement in the preservation of “normalcy” on the other hand. Institutional conformity becomes a mediating factor between “normalcy” and crime.⁵⁰ Academic institutions (schools, universities, scientific institutes), art institutions (covering theater, film, music, painting, architecture, and so on), churches, workers’, youth, and women’s associations, business enterprises, all have their own rules and routines, which point in several directions simultaneously. First, they perform their standard functions; second, they contribute to normalization of the social and political condition; third, they, in different ways, uphold loyalty to the regime, its ideology and its practices.

⁴⁸ See, for example, Konrad Kwiet, “Rassenpolitik und Völkermord,” in Wolfgang Benz, *et al.*, (eds.), *Enzyklopädie des Nationalsozialismus* (Munich: dtv, 2001), 621.

⁴⁹ This is certainly an important question. I discuss it in Chapter Three.

⁵⁰ Victoria Barnett, *Bystanders. Conscience and Complicity during the Holocaust* (Westport: Praeger, 1999), 43.

3.2.3 *Approving outcomes of crime*

The third stage of collective crime is the joint acceptance of its consequences. If the crime has been presented as politically legitimate and morally right, then the implicit pact between the regime and its subjects will require that its outcomes are also acknowledged as legitimate and right. This formulation may appear as merely tautological, or it could be at least argued that it delineates an obvious, almost technical consequence of the joint participation in the crime. However, this stage is critically important for proper comprehension of the problem of moral responsibility. Let it be first emphasized that this acceptance of consequences does not equal acceptance of responsibility for the crime. An analysis of the German and Serbian cases would demonstrate something: during the criminal regime both rulers and ruled behave as if no crime has taken place at all. This attitude is directly derived from the ideological presentation and institutional formalization of the criminal action as a good: the ruling ideology and valid institutional arrangements leave no room for the explication of such activity as criminal, that is, as legally forbidden, and morally wrong.

But the official truth is in this case still nothing more than an institutionalized lie, and not a very powerful one: it cannot possibly hide the fact that the “good action” consists in killing innocent people. And one cannot possibly assume that both the regime and “good subjects” were unaware of the true character of this “good action.” In other words, the fact that there may be no political and social space for these actions to be explicated as criminal and morally blameworthy, does not imply the absence of clear consciousness about their character. On the contrary, we can assume that there exists the knowledge about the facts, but for some reason this knowledge does not result in the explicit comprehension of the moral character and moral consequences of such facts. The regime decided, and its supporters agreed to turn the ultimate evil into the criterion of a politically and morally good action. This is the core of the moral problem, and its actuality is not limited to the time-span of the old regime.

Chapter Two

Politics of Silence and Denial

1 Introduction

What happened yesterday is unchangeable. No structure, relationship, or action from the past can be altered or revoked. Still, we often come across expressions like “coming to terms with,” “working off,” and “mastering” the past,¹ or, adversely, “closing the books,” “reaching forward instead of looking back,” and “letting bygones be bygones.” Such phrases denote different contemporary attitudes to the criminal past: after the regime change people disagree over the issue of whether the past has left legacies that matter today. Recall that the presence of legacies is seldom denied. As I argued in Chapter One, structures, actors and practices of the old regime have not disappeared without trace. Rather, they have undergone a transformation: having lost the capacity to act as formative moments of social and political life, the old institutional and normative patterns, as well as the old actors, retain a degree of presence. But, something that exists is not necessarily relevant. Then, one important question is whether the presence of the criminal legacies calls for some reflection and action. Those who argue against looking back insist that possible reasons for confronting such legacies are outweighed by more important considerations. Those who are ready to acknowledge that the presence of legacies requires crime-specific action, may still fail to reach an agreement on how exactly such a relevance should be comprehended, and what should be done.

In this chapter I focus on the political aspect of the dispute. Does the new political community, legitimized by its democratic intentions, need to reckon with the crimes of the previous regime? Dilemmas that are brought

¹ These expressions are most often coined as translations of the German term *Vergangenheitsbewältigung*.

up by this question span legal, practical-political and moral considerations. This should come as no surprise, especially in the case of collective crimes, given that they are perpetrated in the name of a whole political community, or in the name of a group constitutive of that community. An empirical overview of transitions from criminal regimes reveals different strategies of mastering the past. Answers are sought between the poles of the policy of oblivion and the policy of an open and multidimensional confrontation with the past. A cursory look at the list of such strategies may even suggest that anything goes, that is, we can try to tailor the image of, and the attitude to, the past in a manner we find appropriate for our present political, social or cultural purposes.² We can promote official memory based on the officially established truth about the past, or we can endorse the officially established politics of forgetting, followed by a corresponding ideology of a new beginning. The question can be reduced to a policy issue, and looking for the practical measures needed to remove criminal legacies identified as obstacles to democratic transition. Or, we can acknowledge that these legacies open moral questions, requiring reassessment of our culture and identity, and raising the problem of responsibility. We can opt for a comprehensive legal mastering of the past, which would be based on a systematic and broad identification, trial and punishment of the individuals found guilty for the past crimes. Alternatively, we can opt for amnesty. We can also limit criminal justice to perpetrators of the most difficult crimes, while at the same time institutionalizing an alternative approach to the issues of responsibility, acknowledgement and restoration of justice, say in the form of truth commissions. We can mourn, build memorial sites, compensate victims, reconcile with their community, or we can victimize ourselves by blaming our victims. We can deny crime, or our involvement in it. We can reshape its meaning by claiming that it was a good thing to do. Finally, we can—and most probably will—quarrel over most of these issues.

The above list only provides an overview of the known real-life choices. But it does not tell us why and how choices are made. A political decision has to address several questions. First, are legacies of crime relevant in the context of democratization? Second, if some relevance of legacies is acknowledged, the political task will be to identify its exact nature. “The nature of the relevance” is a perplexing question. It asks *what*, *why*,

² Bernhard Schlink, *Vergangenheitsschuld und gegenwärtiges Recht* (Frankfurt: Suhrkamp, 2002), 89.

for whom, and how the past and its legacies matter.³ The “what” question calls for the identification of the time period, events, and practices that fall under the heading of the criminal past. The “why” question has many facets, and the following is perhaps crucial: is the reason for political reflection and decision-making the character of the past itself, or is it prompted by the imperatives of transition? An answer will depend again on many factors, among which the question “for whom” perhaps stands out: the reasons legacies matter for the community of perpetrators differ from their relevance for the community of victims. Empirical observation informs that the community of perpetrators engaged in the transition to democracy will typically prefer to look forward, and to close the book on the past as fast as possible. Dealing with recent wrongs tends to be a matter of the transition-specific calculus. On the other hand, the community of victims will usually insist on the primary importance of looking back—when they persevere in addressing past wrongs, they are guided by the logic of appropriateness rather than the logic of consequentiality.⁴ Here, the requirement to come to terms with the past is seen as a moral right of the victimized people to have their suffering acknowledged. Acknowledgment is a complex category,⁵ which creates crime-specific duties both for the community of perpetrators and for humankind in general. While these requirements differ, they have the common core: everyone outside of the community of victims ought to look back, and to state in an unambiguous manner that what happened was wrong: it was morally, culturally and politically unjustifiable. A double commitment should follow: first, everyone is duty-bound to work toward preventing recurrence of the horrible events; second, everyone should contribute to moral, material and political return of the victimized people to the civilization from which they were excluded by the recent barbarian acts.

So, when it comes to mastering the past, preferences differ. Since the principal question of this book is responsibility for collective crime, my focus is on the community of perpetrators and the legitimacy of the choices this community and its members make in the transitional context. In Chapter Four I will argue that these choices ought to depart from the

³ Reinhart Koselleck, “Formen und Traditionen des negativen Gedächtnisses,” in Volkhard Knigge and Norbert Frei (eds.), *Verbrechen erinnern. Die Auseinandersetzung mit Holocaust und Völkermord* (Munich: Verlag C.H. Beck, 2002), 26.

⁴ I borrow these terms from a different academic context: James March and Johan Olsen, “The Logic of Appropriateness,” *Arena Working Papers*, Centre for European Studies, University of Oslo, 9/2004, 17.

⁵ See Chapter Four.

moral challenges posed by the character of the criminal regime and its practices, on the one hand, and morally legitimate demands of victims, on the other. But this focus on normative issues itself requires justification: it is necessary to demonstrate that raising the question of collective responsibility is not only morally right, but analytically viable as well. To meet the latter task, I need to confront analytical and normative arguments against addressing past wrongs. While this chapter focuses on politics, Chapter Three proceeds by discussing culture-specific opposition to dealing with the past.

Two blocks of specifically political questions stand out: structural constraints under which the transition from a criminal to a democratic regime takes place, and the complexity of agency. Jon Elster writes about the “cast of characters in transitional justice: wrongdoers (perpetrators), victims, resisters, neutrals, and beneficiaries from wrongdoing.”⁶ Identifying persons who belong to any of these categories is not a mechanical task. It rests on a preceding political decision: “The new regime has to decide what counts as wrongdoings and how to sanction the wrongdoers, and also to decide what counts as suffering caused by these wrongdoings and how to compensate the victims.”⁷ Plainly, the regime has to decide first whether the crime happened; if the answer is affirmative, it has to proceed by stating exactly which actions were criminal, and according to which criteria. The next question concerns the choice of measures to be undertaken to sanction past wrongs and their agents, and to acknowledge victims’ suffering. Note how huge the power of the new regime is: its political decisions and legal rules can re-define the character of past events (by stating whether they were criminal or not), the identities of killers and their supporters (by stating whether—and, if yes, how—they are responsible), as well as the identities of victims (by stating whether they indeed suffered, and whether they deserve acknowledgment and compensation for this suffering). *In potentia*, this is the capacity to re-write the past, by establishing its authoritative interpretation, assigning it a preferred moral meaning, deciding whether to address wrongdoings, identifying and assigning past-specific roles, and choosing the goals, policies, and instruments of the crime-specific actions.

⁶ Jon Elster, *Closing the Books. Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004), 22; also 99–116. For my account on agency, see Chapter Four.

⁷ Jon Elster, “Memories and Transitional Justice,” manuscript, in file with N.D., *Memory of War Workshop*, Massachusetts Institute of Technology, Boston 2003, 1.

Still, the perception of the enormous power of the transitional political authority is perhaps misleading: the issues that give rise to this power are at the same time powerful constraints on the authority's freedom of choice. Constraints unfold in an interplay between the criminal past, the post-regime change condition, and the preferred democratic future: while reaching forward, towards a desired decent society, we apparently have to look back, into our shameful recent past. Empirically, the legacies of crimes are such that they cannot be removed from the publicly relevant collective memory by a political decision. The very presence of survivors, victims' descendants, and their group makes wounds visible; the same holds for the presence of the people who belonged to the old regime's elite, and those who supported the regime. In normative terms, no society aiming for democracy can remain simply silent about recent wrongs: it would be tantamount to arguing that yesterday's injustice does not matter for the people who witnessed it, and who today aim at establishing a just society; even more importantly, it would imply that suffering of victims can be left behind as irrelevant. Hence, political strategies of dealing with the past normally acknowledge the presence of the legacies of wrongdoings, and they ask how to confront them in the context of the transition to democracy. This is the subject of transitional justice, broadly understood as a set of principles, institutions and policies specifically designed and implemented to address recent wrongs. The first question is whether the character of the post-criminal condition requires special justice. The problem of morally sound goals, institutional modalities, and agents of transitional justice can be addressed only if the answer to the opening question is affirmative. This chapter focuses on the approaches which provide a negative answer to the opening question: justice in transition is not (or: it should not be; or: it cannot be) special.

This introduction (Section 1) is followed by two more sections, which explore two political strategies that in different ways and for different reasons try to minimize the relevance of criminal legacies in the transitional period. Section 2 presents a family of practical political approaches which accept the fact of crime, and which acknowledge the blameworthiness of this practice. Still, the common claim is that transitional justice should be avoided: books should be closed, and society should focus on a forward-looking democratic transition. This strategy is explained and justified by referring to the character of the context. The context is typically understood as a complex set of structural and identity-specific constraints confronting a society in transition. Call this approach the politics of silence. In analyzing its applications and theoretical defense, I will distin-

guish between one general argument and three specific arguments. The general argument concentrates on the claim of vulnerability of democracy. Three specific arguments are derived from the general one: protection of the core of collective identity, unjust imposition of collective guilt, and unmasterable burden.

Section 3 explores a different approach. Like the former, it favors silence about the past. In difference to the former, it denies, or heavily minimizes wrongdoing. This strategy is based on a radical ideological stance, which after the change draws the moral distinctions by refusing to acknowledge the past events as wrong. This is the strategy of denial, most often followed by the choice of non-action.⁸ It re-evaluates past events by way of an interpretation that ultimately provides an *ex-post facto* justification of the old regime, its actions, and the prevailing popular attitudes. A suitable reading of the contemporary perspective follows, together with an explanation of the choice of a peculiar forward-looking political approach to transition. I will present the main features of this strategy through the analysis of the political condition in Serbia after the fall of Milosevic's regime.

The two approaches agree that justice after the change of regimes matters, but both abandon transitional justice. The first acknowledges injustice of yesterday, but argues that justice for today requires that society does not engage in the processes of coming to terms with the past. The second approach simply argues that no injustice has been done. Thus, both approaches challenge, though in different ways, the standard assumption according to which transitional justice is a requirement for any society emerging from a period of atrocities.

2 Transitional Justice or Just the Transition? Politics of Silence

In this section, the term "politics of silence" refers to policies designed and implemented by authoritative decisions, which aim at removing the discussion about criminal legacies from the political agenda. The supporters of this political strategy acknowledge the challenge of recent wrongs. Still, they find the choice of the official oblivion and non-action the only

⁸ Non-action is not the only possible strategic choice following this type of denial. Sometimes, political elites will engage in a justificatory action, which will either try to affirm the alleged positive elements in the recent past, or to effectively remove that past from public memory. A detailed analysis is provided below.

plausible option. The argument that reaching forward should enjoy primacy leads in this political reading to a radical attitude to the past-related concerns: public acknowledgement that bad things happened recently is followed by a political decision to remove reflections on that past from the public realm. The approach insists on the primacy of the context, where the context is understood as a combination of two types of features: first, impediments to democracy that have to be managed, and, if possible, overcome; second, specificities that have to be respected. Impediments are transition-specific, either as legacies affecting the democratizing process, or as newly-born constraints arising from the complexity of the transitional process. Specificities deserving respect, that is, qualities that have to be protected typically concern the cultural identity of the group. One important claim is that disregarding the complexity of thus perceived context would result in wrong strategies and failed actions, disrupting ultimately the transitional process itself. It follows that the political task is to properly identify the given condition, and to find analytically accurate responses. The constraints we accurately identify tell us what can rationally be done. The answer to the normative challenge of justification follows. We will justify the choice of the politics of silence by referring to the contextually limited space for action: doing things the right way is not axiomatic; its meaning is shaped by doing what one can.

A distinction between external and internal perspectives can perhaps help explain this argument. An external observer may identify the conflict between devastating evidence about past events on the one hand, and strategic and normative preferences of the transitional society on the other. Still, he or she will typically take a universalist stance, arguing that transition-specific considerations should not be allowed to act as preemptive arguments against institutional and moral coming to terms with the past. Put simply, the burden of the truth is too heavy to "let the bygones be bygones." But, the advocates of the politics of silence argue that the universalist position is achieved at the expense of reducing the complexity of the post-criminal condition. Properly assessed, the internal perspective imposes specific demands and constraints. The very fact of the presence of the difficult legacies does not imply that we should deal with them. The nature of that past is such that handling it publicly would impose insurmountable obstacles on the transitional discourse and policies. Our political aims and the values we strive to establish are at odds with the public revelation and authoritative promotion of the truth about the past. This is so, because the context deprives citizens and political elites of the capacity to integrate the knowledge about the past into a liberating narrative and

practice. Rather than being conducive of democratic transition and stabilization, knowledge about past wrongs tends to be subversive. Democracy, which we strive to achieve, should be promoted and consolidated through dealing with the present condition in a future-oriented way, within the newly established standard democratic institutional framework.

2.1 GENERAL ARGUMENT: VULNERABILITY OF DEMOCRACY

What exactly makes democracy vulnerable after collective crime? Where does the contextual complexity of the democratization process point to? Transition refers to the ways and dynamics of establishing and affirming an institutional arrangement based on the separation of powers, the rule of law, primacy of human rights, and free economy. A new regime is confronted with multiple problems which burden the transitional process with always new and often mutually contradictory political, economic, normative, and cultural imperatives.⁹ This empirical insight leads to an argument that claims both analytical and normative validity: in a transitional context, the demand to deal systematically with the legacies of crime would only divert attention from really pivotal issues, opening up at the same time a Pandora's box of painful questions to which there is no conclusive answer, and resulting in the final outcome of further deepening already thorny social, political, ideological divisions. If we agree that transition to democracy requires a minimum consensus of values, goals, instruments, and the sequencing of transitional steps, and if we pay due attention to the fact that such a consensus in a new polity is either non-existent, or—at best—extremely vulnerable, then a rational strategy requires applying “gag rules,” that is, agreeing to leave aside all the issues that could harm the prospects of reaching and stabilizing social and political integration around democratic values and practices. The baseline looks simple, though not actually self-comprehensible: “It is natural for a fledgling democratic government to be primarily concerned with its own survival, stability, and influence.”¹⁰

Indeed, threats arising from the past often look like the most convincing reasons against dealing with that past. The most compelling argument

⁹ Jon Elster, “The Necessity and Impossibility of Simultaneous Economic and Political Reform,” in David Greenberg, et al. (eds.), *Constitutionalism and Democracy. Transitions in the Contemporary World* (New York: Oxford University Press, 1993), 266–274.

¹⁰ Thomas Pogge, “Achieving Democracy,” *Ethics and International Affairs*, Vol. 15, No. 1, 2001, 15.

points to the character of the regime change: the more thoroughly the old regime is discredited, the lesser is the presence of its agents, normative system, and instruments of coercion. This in turn creates more freedom for democratizing elites to address past wrongs.¹¹ On the opposite pole stands the case of negotiated transition. This type of regime change is achieved by a compromise between the authoritarian rulers and the supporters of democracy. Spain, countries of Latin and Central America, and some post-communist states (Czechoslovakia, Hungary, Poland) provide examples. Negotiated transitions typically leave in place powerful elements of the old military and police apparatuses. Dilemmas about the course of action originate from the precarious balance of powers between old and new elites.¹² The new elite may recognize the necessity of dealing with past abuses, only to find the principal perpetrators safely nested in the protected old institutions, often controlling the main instruments of coercion.

The negotiated character of transition is not the only source of vulnerability of a post-criminal democracy. Take the transition, radical or negotiated, from a populist criminal regime, which I identified as the regime engaged in collective crimes—that is, supported by the majority of the subjects in its criminal practices. In such situations, attitudes and beliefs about the past become the key variables of the decision whether and how to engage in transitional justice. The majority was supportive of the old regime, believing that its actions—including the criminal ones—were right and appropriate, and, thus justified. Here I only introduce the dilemma of the political relevance of this question, to which I will return in sections below, in passing.¹³ Ordinary people, yesterday's supportive bystanders, are supposed to become the decent citizens of a democratic re-

¹¹ Alexandra Barahona De Brito, Carmen Gonzalez Enriquez, Paloma Aguilar, "Introduction," in De Brito, Enriquez, Aguilar (eds.), *The Politics of Memory: Transitional Justice in Democratizing Societies* (New York: Oxford University Press, 2001), 11–14.

¹² The literature is vast. See, among others: Jose Zalaquett, "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints," in Neil Kritz (ed.), *Transitional Justice. Vol. I: General Considerations* (Washington: United States Institute of Peace Press, 1995); Guillermo O'Donnell and Philippe Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore: Johns Hopkins University Press, 1986); Luc Huyse, "Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past," *Law and Social Inquiry*, Vol. 20, No. 1, 1995; Jon Elster (ed.), *The Round Table Talks and the Breakdown of Communism* (Chicago: University of Chicago Press, 1996).

¹³ Chapter Four offers a comprehensive analysis of the moral relevance of collective crime for the post-criminal condition.

gime. It is clear what they felt about the criminal regime and atrocities yesterday. It is difficult to assume that, thanks to the regime change, they changed their attitudes and beliefs overnight. As the case of Germany after the fall of Nazism vividly demonstrates, a difficult question for the new regime is whether to confront legacies of the widespread positive emotions about the old regime, and try to change them by means of purposeful authoritative actions. A rational concern is that such actions may unleash strong negative emotions not supportive of democracy: shame, guilt, anger, or hatred.¹⁴

An additional reason for concern is the weakness of new democratic institutions. The multiple tasks of transition require diverse state capacities, which are often missing. Adding requirements of transitional justice would further burden the weak state, threatening the transition process.¹⁵

These and related problems come down to the question of whether the pursuit of criminal justice would threaten peace and stability of the nascent democratic regime. If the room for prosecutions or alternative forms of transitional justice is substantially limited, the new elites may find it necessary to sacrifice the backward-looking justice for the sake of the forward-looking democratization process.¹⁶ While in an ideal world it would indeed be right and fair to address the normative, social, and political burden created by past wrongs, democratizing elites sometimes have to concede to forward-looking political prudence, which tells them that a justice-centered strategy would be inimical to the goals of democratic transition.¹⁷ This comes close to the distinction between “idealist” and “realist” approaches to the “transitional justice v democratic transition”

¹⁴ Elster, *Closing the Books*, 217.

¹⁵ “There is a sad irony in this. On the one hand, the countries with the weakest democratic traditions and institutions are the least prepared to carry out adequate truth and justice policies. Yet it is exactly in such countries where lies have triumphed the longest, and where repression has lasted the longest and claimed the most victims, that the need for justice and truth is most acute. Conversely, it is often in countries where tolerance for arbitrary rule is lower and repression relatively lighter that conditions for prosecution and truth telling are most favorable. And it is also in these countries that social organizations and political parties are more likely to demand such policies, given the influence of historically constituted political cultures favoring individual rights and the rule of law.” De Brito et al., 17.

¹⁶ “The incoming forces often have two conflicting desires: for a peaceful transition and for transitional justice. When negotiating with the outgoing leaders to achieve the first goal, they may have to sacrifice the second.” Elster, *Closing the Books*, 190.

¹⁷ See for instance: Stephen Holmes, “The End of Decommunization,” *East European Constitutional Review*, Vol. 3, No. 3–4, 1994, 33–36.

dilemma. In Ruti Teitel's reading, "idealists" are those who insist on the primacy of a universalist conception of justice: comprehensive justice should be done, as a prerequisite for any attempt aiming at liberal change. "Realists," on the other hand, view transitional justice as instrumental to democratic transition, and they look into the balance of powers to infer whether, and what type of transitional justice is needed. Rather than "what ought to be done," they ask "what can be done."¹⁸

Still, "realists" would not concede that their concern is merely, or primarily instrumental. A deeper rationality, involving the idea of justice appropriate to transition, is at stake. Overcoming the old divisions for the sake of the future stability can be achieved only by putting faith in democratic mechanisms.¹⁹ We can implement democracy and make it reality only by accepting rules, roles and modes of action prescribed to us by its procedural requirements. If committed to doing this, we—as citizens and as political elites—would soon find ourselves supporting values and principles that underlie formal structures of democracy. In other words, by practicing democracy, we achieve two principal past-related goals. First, by accepting a new institutional—legal, political, economic—framework and corresponding practices, we dismantle those structural constraints that are identified as legacies of the past. Second, the practice of democracy makes reflection on the wrongs of the past obsolete, because our—structurally imposed—acting autonomously and responsibly, within democratic constraints promotes new values which we interiorize in the process. Consequently, it means that even if in the past we used to be morally and politically co-responsible "fellow travelers" of a wicked regime, its ideology, system of values, and ways of action, will gradually cease to be relevant for us.

True, this is not necessarily an easy process, devoid of struggles, contradictions or even remnants of the past resurfacing occasionally. But none of this implies, justifies, or creates room for the special case of transitional justice. No matter how difficult the burden of the past is, we need always to recall the simple truth that historical time does not have a stop. The principal objection against advocates of the past wrongs-specific tran-

¹⁸ Ruti Teitel, *Transitional Justice* (New York: Oxford University Press), 3–5.

¹⁹ "The argument for leniency rests on the need to achieve national reconciliation so that a conflict-torn society can proceed to build a new democracy based on tolerance and accommodation of factions that have very recently tried to destroy one other." – Juan Mendez, "National Reconciliation, Transnational Justice and the International Criminal Court," *Ethics and International Affairs*, Vol. 15., No. 1, 2001, 28.

sitional justice follows: their position is utopian. Having assigned both analytical and normative superiority to an abstract universalist conception of justice, they fail to account for the relevance of the post-criminal context. Although they do insist on the primacy of the context, advocates of backward-looking justice fail to realize that the instruments of dealing with the past should be context-specific as well. This is why they end up with a moralistic demand for the mechanical application of the context-independent precepts of universal morality to one particular, artificially isolated question of democratic transition. The requirement to deal separately with the past urges us to do the impossible: to single out one particular set of issues and proclaim its solution as the pre-condition for entering democratic process. Even if we made a political decision to that effect, and tried to come to terms with consequences of the past first, this process would most probably unfold as a fierce contestation between those who hold opposing positions on the political, cultural and moral meaning of the past. And it is very unlikely that such a struggle would result in any convergence of opposing views. To the contrary, one can realistically expect that the outcome would only be the stabilization, or deepening, of social and political divisions.

This prediction is not based just on the historical evidence of the known cases in which such attempts were made—only to fail subsequently. It relies principally on the insight that the stakes in a controversy about the proper addressing of the past, seen from the contemporary perspective, are very high. These are not merely issues of political expediency. Involved, rather, are ultimate moral questions. A conclusion for this approach reads: separate dealing with the consequences of the past is dangerous for a new democracy and, for this reason, should be avoided. Circumventing the evil past is a matter of the right evaluation of limits of practical morality and, consequently, of the prudent political acting of transition elites. In this sense we can talk about politics and policy of forgetting, where forgetting is to be understood as a metaphor for the decision not to allow the evil past to become publicly relevant in the democratizing process. Or, since consequences of the evil past *are* discernible in the present, they need to be made publicly irrelevant. Politics of forgetting is the strategy aimed at overcoming the past by means of refusing to address recent wrongs as a separate problem of the transition to democracy. It focuses on practical legal, political and economic actions that are expressly designed to deal with particular problems of the post-regime change condition from the perspective of the preferred future, hence addressing criminal legacies only indirectly.

2.2 SPECIFIC ARGUMENTS

2.2.1 *Political reconciliation in the name of protecting the genuine common identity*

There exist many historical examples of political preferences or even decisions to deny public relevance to the preceding disturbing times and events. This position often opens with a statement of fear: a confrontation with legacies threatens the return of the past, understood as the reopening of animosities that led to the atrocities. A shared concern seems to be found in Cicero's (year 44 BC) statement made two days after Caesar's murder—*omnem memoriam discordiarum oblivione sempiterna dele-dam*—and in Churchill's 1946 plea for a "blessed act of oblivion."²⁰ This preference for public forgetting sometimes gets the form of authoritative decisions. Consider the following example from the French political history.

Accepting the requirement to enact the Constitutional Charter as the condition for the restoration of monarchy in France and his return to the throne, King Louis XVIII adds a preamble to this Act,²¹ in which he states (most probably, upon the agreement of the addressees):

[...] Attempting to review the chain of the times, which disastrous errors have broken, we have banished from our recollection, as we could wish it were possible to blot out from history, all the evils which have afflicted the fatherland during our absence [...] The dearest wish of our heart is that all Frenchmen should live as brothers, and that no bitter recollection should ever disturb the security that must follow the solemn act which we grant them today.²²

While this statement, given the doubtful legal status of constitutional preambles, can still be held a merely symbolic expression of resolve to reach political compromise, Article 11 of the Charter supplies this view with unequivocal legal force:

All investigations of opinions and votes given prior to the restoration are forbidden. The same oblivion is required from tribunals and from citizens.²³

²⁰ Christian Meier, *Das Verschwinden der Gegenwart. Über Geschichte und Politik* (Munich and Vienna: Carl Hanser, 2001), 71.

²¹ For the reference to the Constitutional Charter of 1814, I am again indebted to Meier, *ibid.*

²² *The Constitutional Charter of 1814*, Reference Library of Political Documents. Available at: <http://www.napoleonseries.com/reference/political/legislation/charter>.

²³ *Ibid.*

These utterances merit some attention. In the preamble, the King pleads for, and declares oblivion, which is followed by the stipulation of amnesty in Article 11. Still, this banishing of the past “from our recollection” does not equal its disappearance, given that the recent events cannot be “blotted out” of history. What has happened cannot be meaningfully proclaimed non-existent, but we can still decide to draw a sharp line between the bad past and the desired future. Stakes are high, and they are summarized as the demands for peace, stability, and security, which should be established in the transitional condition, to extend into the future. Such a new beginning, however, ought not to come *ex nihilo*. What is needed if “all Frenchmen should live as brothers,” is the re-establishment of “the chain of the times” beyond recent disaster. This is where interpretative denial²⁴ enters, defined as a duty to reach a consensus about the public irrelevance of recent disturbing events. Two important claims are exemplified here. First, rather than being reduced to a mere denial of the relevance of the recent events, oblivion should be based on a renewal of the continuity with the better past, the continuity that allegedly had been only temporarily broken. The argument captured by the term restoration, which labels this particular period of French history. The points of reference for the constitutional restoration are traditions and values that the political elite identifies as the “true core” of collective identity: “We have sought the principles of the constitutional charter in the French character and in the enduring examples of past ages.”²⁵

This brings us to the second claim. Dealing with the past in the manner of its silencing requires that we identify and in a particular way acknowledge our “unity of a higher order.” Our society may be deeply shattered, or humiliated by what happened in the recent past. But this is still not sufficient reason to expose ourselves to rituals and practices of blame and responsibility. Such actions would only further deepen recently created divisions, undermine our identity, our sense of self-respect, as well as the prospects of political stabilization and, consequently, our capacity to attain the desired future. Plainly, instead of looking into what was bad in our recent past, we need to look at the big picture, and reach out to what has always been good in our history. To silence the past means to identify,

²⁴ In the case of interpretative denial “the raw facts (something happened) are not being denied. Rather, they are given a different meaning from what seems apparent to others.” – Stanley Cohen, *States of Denial. Knowing about Atrocities and Suffering* (Cambridge: Polity Press, 2001), 6.

²⁵ *The Constitutional Charter of 1814*.

isolate and make publicly irrelevant that particular moment of our past which is not up to the best self-interpretation of our intergenerational shared identity. We shall do this by promoting continuity with our true collective self. Relying on our “true commonality,” we should build the bridge to our “better,” or “genuine” past. This process of restoration includes the tacit agreement to exclude, as irrelevant for political and social identity, the recent disturbing sequence.²⁶ This is a feasible goal because the recent events did not destroy, or distort beyond recognition the core features of our shared identity. Seen in this regard, the task of transition is not to create new identities, but rather to liberate already existing true identities from the illegitimate chains imposed by the foul past. If this reasoning is accepted, the decision not to look into recent events surfaces as a legitimate strategy.²⁷

An additional feature of the argument is that being comprehensive in its ambitions, the systematic dealing with past crimes necessarily falls into the trap of radicalism. Such a policy cannot differentiate between what is worth preserving in our traditions, collective memories, and shared meanings, on the one hand, and its own all-encompassing intention to create a moral and political landscape free of bad legacies on the other hand. Thus, what we need instead of dealing with legacies of the criminal past, is a very different cultural and political look into the long continuum of our true, exclusive and unrepeatable horizon of meaning. The purpose of this effort is to defend our genuine collective self, both from the threats of the return of the recent oppressive regime, and from the moralistic efforts to

²⁶ Yet another example of this line of political reasoning provides a more recent episode from French political history, as recounted by James Booth: “In 1992, François Mitterand, then president of the French Republic, was asked to lend his voice, on behalf of France, to the commemoration of the July 1942 roundup of Jews [...] in Paris and their subsequent deportation to Nazi concentration camps. Specifically, he was asked to acknowledge the role of France in the persecution of Jews and others during the dark years of occupation. This act of atoning remembrance would inscribe in public memory the complicity of France in these crimes. Mitterand at first resisted... At the core of his refusal of responsibility and of public remembrance was the claim that France was identical with (as De Gaulle expressed it) *une certaine idée de la France*, namely, that of free, republican France. As such, the Vichy regime was a parenthesis in the continuous history of the Republic, ‘a new regime, different and temporary,’ as Mitterand described it.” – James Booth, “Communities of Memory: On Identity, Memory, and Debt,” *American Political Science Review*, Vol. 93, No. 2, 1999, 249–250.

²⁷ For a reliable summary and a critical analysis of this view, see Anton Rabinbach, “The Jewish Question in the German Question,” in Peter Baldwin (ed.), *Reworking the Past. Hitler, the Holocaust, and the Historians’ Debate* (Boston: Beacon Press, 1990), 47.

break cultural continuities, and to establish a new regime of truth on the basis of an exclusive focus on the immorality of recent atrocities. Consider the following summary of the argument offered by Michael Stürmer:

There are two possible explanations for this search of a lost time. One sees in this search a renewal of historical consciousness, a return to our cultural traditions, a promise of normalcy. The other reminds us that if we find no substance in the present we will turn our gaze to the past in order to find direction and assurance. Both explanations are relevant to the recent search for older history. A loss of orientation and a search for identity are closely related. But anyone who believes that this trend will have no effect on politics and the future is ignoring the fact that in a land without history, the future is controlled by those who determine the content of memory, who coin concepts and interpret the past.²⁸

The first of Stürmer's explanations states that after a difficult past, there can be no social, cultural, and political normalcy without reconstructing our true shared identity. "Cultural tradition" is perceived as a social fact, *and* as a normative given. As a social fact, it is "out there," as an external point of orientation, which contains all the sociologically relevant features of the nation's uniqueness. Accordingly, "loss of orientation" does not imply that tradition is destroyed; it only implies that some people²⁹ are wrong, due to their inability, or lack of readiness to read the history and understand the memory. As a normative given, tradition is "in here," as a principled, presumptively interiorized, source of the right and good, justice and truth; this normative framework is authentically ours, which again shapes the framework of legitimate thinking and acting in past-related matters: answers to identity questions cannot rest on the particular views of those who are led by a moralistic obsession to "coin concepts and interpret the past." The second explanation points to the specificities of the transition from the sinister past. Indeed, standing on the ruins left behind a catastrophe, we apparently "find no substance in the present"; hence, we do not know how and where to go from here. The question is political: it concerns the authoritative choice of the constitution of the new polity. An answer requires that we look for the interpretative point of political orientation not in abstract moral universals, but in our deeper past, the past that

²⁸ Michael Stürmer, "History in a Land without History," in Ernst Piper (ed.), *Forever in the Shadow of Hitler? Original Documents of the Historikerstreit* (New Jersey: Humanities Press, 1994), 16.

²⁹ The critical sting is directed at Jürgen Habermas, and his position in the *Historikerstreit*, in particular his insistence that German culture and politics after World War II ought to depart from, and keep returning to the legacy of Auschwitz, as the symbolic formative point of the German democratic identity.

is more genuine than the recent troublesome episode—democracy requires going back beyond crime, to recapture the true social spirit.³⁰

The message is clear: neither life together, nor political community are possible without an unquestionable basis, which can be provided only by the national identity or, more precisely, a proper, that is, affirmative, constitutional, political and cultural reading of the nation's history. The same author continues: "Confronted by an increasing lack of grounding, however, we must ask how long the petrified guest from the past should be permitted to veto civic virtue and love of the fatherland, both in the future and in the past?"³¹ The "petrified guest" is the Holocaust, a menace that has to be pacified, placed into the history textbooks and detached from the present, so that it does not prevent us anymore from living in accordance with our genuine values and attachments. Our "guests" obviously do not belong to us, our virtues and objects of love obviously do.

Once we complete this reconstructive task, we will be able to safely look forward, reliably guided in search for our democratic future. Those who insist on building a new cultural and political identity on the basis of reflection on the shameful recent events are disregarding cultural identity over time, for the sake of imposing an artificial cultural project that can only be realized at a high social and political cost. This claim brings to the fore the argument of injustice. Let me address it in some detail.

2.2.2 *Injustice*

In his inaugural speech at the opening session of the Bundestag (September 1949), Konrad Adenauer, the first prime minister of the newly established Federal Republic of Germany, talks mostly about economic and political tasks of the reconstruction of the country. His references to the

³⁰ In Germany, Friedrich Meinecke was the first to explicate the view of Nazi rule as a deeply disturbing and shameful period, which came from without (like a natural catastrophe). This is not to say that science cannot discover the causes of Nazism (Meinecke found them in Hitler's ideological amalgamation of socialist and extreme nationalist ideas)—but these causes are not a part of the properly conceptualized national history. Thus, German return to civilization should be accomplished as the re-establishment of the nation's genuine historical continuity. Note, however, that for Meinecke this did not mean avoiding responsibility for the atrocities of the Nazi era. — Friedrich Meinecke, *The German Catastrophe* (Cambridge, Mass.: Harvard University Press, 1950), 85.

³¹ Michael Stürmer in the *Frankfurter Allgemeine Zeitung*, December 27, 1993; quoted after Jürgen Habermas, *A Berlin Republic. Writings on Germany* (Cambridge: Polity Press, 1998), 5.

Nazi time are sparse. He addresses the past from a perspective decisively framed by forward-looking considerations. Adenauer's only sentence about the recent German atrocities is formulated as a moral distancing from those who in post-war Germany still express anti-Jewish attitudes and take anti-Jewish actions.³² His specific past-related concern is focused on those legacies, which the new government identifies as direct hindrances to economic and political normalization. These are not legacies of the Nazi past itself, but rather problems created by an improper dealing with that past after the war. The policy of the occupation powers is revealed as the main setback: "Denazification has brought a lot of suffering and a big damage."³³ This was not a novel claim. Rather, it was a summary of the political attitude of the German elites in the Western occupation zones to denazification. What stood behind this opposition?

Denazification, the policy of mastering the consequences of the Nazi past, was formulated and implemented by the Allies in the period between liberation and the establishment of the West German state. It was aimed not only at the criminal prosecution of perpetrators, but also at purging the state administration, judiciary, party elites, universities, media, and other organizations, of all the individuals who belonged to the NSDAP and satellite organizations, or who collaborated with the regime. Executed predominantly in a formalized administrative manner, denazification failed to properly address the attitudes of the German population to the old regime.³⁴ After the war, the vast majority of German citizens "basically had no real comprehension of demands that the Nazi burden be dealt with in intellectually and morally sensitive, introspective fashion."³⁵ Although not justifiable, this position was understandable to some extent—at least, one could not deny the relevance of the circumstances when evaluating

³² "Erste Regierungserklärung von Bundeskanzler Adenauer," 20. September 1949, Konrad-Adenauer-Stiftung. Available at http://www.kas.de/publikationen/2001/820_dokument.html.

³³ *Ibid.*

³⁴ For a detailed analysis of the denazification policies, see e.g.: Wolfgang Benz, "Zum Umgang mit der nationalsozialistischen Vergangenheit in der Bundesrepublik," in J. Danyel (ed.), *Die geteilte Vergangenheit. Zum Umgang mit Nationalsozialismus und Widerstand in beiden deutschen Staaten* (Berlin: Akademie Verlag, 1995), 47–51; Beate Ruhm von Oppen, *Documents on Germany Under Occupation, 1945–1954* (New York: Oxford University Press, 1955), 234.

³⁵ Norbert Frei, *Adenauer's Germany and the Nazi Past. The Politics of Amnesty and Integration* (New York: Columbia University Press, 2002), 301. In many important respects, this section follows the lead offered by Frei's impressively detailed, well documented, insightful, and morally balanced work.

the German post-war attitudes to the Nazi crimes. While in the closing stages of the war Germans had to endure bombardment, siege, and hunger, the first months and years of peace were marked by a life of poverty among ruins, without clear prospects for betterment. When the requirement to look back and to express atonement came from the victors, it—in spite of the Allies' policy being sweeping in quantitative terms—hardly contributed to the creation of a sense of responsibility, blame, or increased moral sensibility for the suffering of victims.³⁶ Rather, denazification was met by disapproval among most of the population, the prevailing stance being that of refusal to engage in the re-education and mourning (*Trauerarbeit*) officially required by the Allies.³⁷ The realities of the Nazi crimes seemed to have remained hopelessly distant from the consciousness of the German citizens.³⁸

Although it ultimately failed to achieve the proclaimed goals, denazification was effective in discovering the existence of a strange dual reality in German society and politics, stabilized both as a normative and as a practical-political gap between attitudes to the past and attitudes to the future. On the one hand, it was more or less apparent that neither the new political elites, nor the citizens wished for anything that would resemble a return of the old regime. A fundamental consensus about the choice of democracy was clearly formulated in the constitutions of the newly established regions (*Länder*), and endorsed by all licensed political parties. The population, on its part, seemed to yearn only for the normalization of everyday life: “[...] The desire to end the decades of chaos through a deep “clean break,” with the prospect of a better future, was deeply anchored in the heads of virtually all Germans.”³⁹ On the other hand, political elites and citizens apparently did not want to learn the truth about the past, let alone to accept responsibility for it. Thus, when the policy of denazification unambiguously coupled the legitimacy of the new regime and of the new, rights-based status of the citizenry with the requirement to reflect on the character of Nazi times, it stumbled upon collective rejection.

³⁶ For a detailed account, see e.g. Anthony Glees, *Reinventing Germany: German Political Development since 1945* (Washington: Berg Publishers, 1996), 3.

³⁷ Ralph Giordano, *Die zweite Schuld, oder von der Last Deutscher zu sein* (Hamburg: Rasch und Röhring, 1987), 88–93.

³⁸ Hannah Arendt, “The Aftermath of Nazi Rule: Report from Germany,” in Hannah Arendt, *Essays in Understanding: 1930–1954*, ed. by Jerome Kohn (New York: Harcourt Brace, 1994), 250.

³⁹ Frei, 308.

The rationalizing discourse, expressed in a combination of denial and self-victimization, may have originated from the experience of suffering in the closing stages of war and first years of peace. But, between 1945 and 1949, in certain regions and among sections of the political and cultural elites this rationalization was gradually shaping into an antidemocratic resentment aimed primarily at the occupation powers, but in effect, threatening the whole transition process.⁴⁰ By the establishment of the state in 1949,⁴¹ major political parties effectively reached an implicit consensus on opposing the denazification process. Confronted with the diffuse, but nonetheless widespread rejection of the population when it came to confronting the past, based on an apparently prevailing sense of solidarity with the old Nazis and the supporters of the regime, and upon the first signs of a political articulation of such attitudes, political elites were quick to conclude that failure to distance themselves from Allied policies would severely damage their electoral prospects. For them, as competitors in the political arena, it probably looked extremely dangerous to argue for a “purification” of the citizens who were not only sending clear signs of the highly unfavorable view they took of such a course of action, but who also had, relatively recently, unambiguously expressed their preferences and value orientations in supporting Hitler.⁴² Hence, new political elites read-

⁴⁰ *Ibid.*, 236.

⁴¹ Oppositional voices were rare and carefully guarded. Theodor Heuss, the first President of the Federal Republic of Germany, in his inaugural speech which preceded Adenauer's by a couple of days, tried to point to the moral importance of remembering: “It is a mercy of destiny that human beings are able to forget. How could we, as individuals, live at all, if we had to continuously recall suffering, disappointment and sorrow we had to endure in our lives? Capacity to forget is a mercy for nations as well. Still, I am afraid that some people in Germany could abuse this mercy by forgetting too soon. We ought to have a clear sense of what brought us here where we stand today. This ought not to be a word of vengeance, a word of hatred. I hope that we will be able to transform this confusion in our souls into a unity of our people. But we must not make this task easier for us by forgetting what Hitler's epoch left us with.” – Quoted after Helmuth Dubiel, *Niko nije oslobođen istorije. Nacionalsocijalistička vlast u debatama Bundestaga* (Belgrade: Samizdat B92, 2002), 43–44 [Serbian-language translation of: Helmuth Dubiel, *Niemand ist frei von der Geschichte. Die nationalsozialistische Herrschaft in den Debatten des Deutschen Bundestages* (Munich and Vienna: Carl Hanser, 1999)].

⁴² “It is possible that at the start of the 1950s, a tacit admission of one basic circumstance was not as widespread among the Social Democrats as in the Union—but in the end all the democratic parties knew they had to win their votes from a populace that, in free and fair elections, would have chosen Hitler by an overwhelming majority a mere decade earlier.” – Frei, 310.

ily accepted the prevailing popular view of denazification as the essentially one-sided, unjust, and unselective “justice of the victor.”

At the same time, being still heavily constrained in their political moves by the Allies, German politicians had to accept that the consent of the occupation powers remained the additional and equally important source of their legitimacy. Hence, it was necessary to fulfil the Allies’ expectations and requirements. In difference to the support of the population, this latter aspect of legitimacy was to an important extent framed in normative terms, requiring that Germans demonstrate their faithfulness to democratic principles and arrangements, as well as their ability to work towards democratic normalcy. This in turn necessitated that opposition to denazification, and the demand for amnesty and integration, be presented as necessary features of the democratic transition.

This is the background against which Adenauer formulates the policy for the past. He has to combine political preferences of the German elite and the population with the constraints imposed by the Allies. In particular, it is necessary to demonstrate to the Allies that their insistence on looking back and coming to terms with the past by means of widespread punishment, is incompatible with another goal, the one they share with the German people and politicians. The goal is democracy. The reason for this incompatibility is injustice done to the German people by denazification:

Those who are really guilty of the crimes committed during the Nazi rule and in the war should be sternly punished. But we must not make distinction between two classes of population anymore, those who are politically objectionable and those who are not... Hence, the Federal Government will have to address the question of amnesty, and to consider the proposal to submit a request to High Commissioners that the military tribunals of the Allies grant amnesty for the punishments imposed thus far. On the one hand, the Federal Government is determined to leave the past behind, because we are convinced that many were punished for the guilt that subjectively had not been that difficult at all; but, on the other hand, we are equally determined to draw from the past the lessons necessary for the right attitude towards all those who are today undermining the existence of our state, regardless of whether they are classified as the right or the left radicals.⁴³

Thus formulated, the policy for the past has two principal goals. The key word is normalization. It is based on an evaluation of the past attitudes of the Nazis, their supporters, and ordinary people, followed by a justification of the preference for looking forward. The first goal summarizes political preferences of the German elite: denazification should be brought to

⁴³ Adenauer, *ibid.*

a halt, and its already achieved results should be re-visited and corrected. This policy was to be implemented through the amnesty and re-integration into the democratic community of the widest possible number of those involved with the Third Reich. The second goal follows from the requirement of the top-down normative legitimation: to find the common denominator with the Allies' concerns, the German elite had to present amnesty and integration as the necessary steps towards the normative separation from Nazism.⁴⁴

The essence of the argument is to be found in a combination of the two statements from Adenauer's inaugural speech: the new government is "determined to leave the past behind," while at the same time being "equally determined to draw the lessons from the past." Adenauer realizes that the German condition is caught between the difficult past and the outlined, axiomatic preference for the democratic future. His claim that the past must be left behind, while neatly summarizing the views of political elites and the prevailing mood among the population, still fails to properly address the gap that exists between the democratic legitimacy as envisioned by the Allies, and the pressure coming from below. While the Allies see distancing from the past as the pre-condition of any meaningful progress towards democracy, the majority of citizens require solidarity with perpetrators and supporters. Having sided with the latter request, Adenauer immediately engages in its relativization, by making concessions to the former. He explicitly states that the new beginning requires more than merely turning one's back on the past. The way to justify the policy of forgetting consists of two steps. First, it is necessary to demonstrate that legacies ("lessons from the past") that impose obstacles to democratic transition are identified and addressed. Second, it should also be demonstrated that the preference for forgetting comes from the right perception of those legacies in the context of the democratic transition.

Adenauer's practical-political precision is remarkable: learning from the past is valuable because it tracks down the enemies of democracy ("those who are today undermining the existence of our state"). The justificatory gist of this reading is clear. The Allies need to accept the policy of integration, because the enemies of today are infinitely more dangerous than the enemies of yesterday. The right insight into the past will inform that the guilt of many punished during denazification "subjectively had not been that difficult at all." In other words, it is necessary to understand the most severe context to which the German population had been ex-

⁴⁴ Frei, 303.

posed during the Third Reich. Those people are not enemies of democracy, and they should not be made “politically objectionable” anymore on the mere account of their being subjects (or supporters, for that matter) of the old regime. Instead, everything has to be done to integrate them into the democratic citizenship of the new Republic. Thus, the German government should focus on building a democratic future, together *with all* Germans, *for all* Germans. The policy of punishment has already revealed its two major weaknesses, and Adenauer specifies both of them in the manner that promotes the legitimacy of the proposed policies of his government. First, in insisting on punishment of the war criminals and Nazi supporters, its promoters failed to realize that the dangers to democratic transition are not past-specific: democracy is not only or primarily threatened by the former Nazis, but rather by radicals of all colors, “regardless of whether they are classified as the right or the left radicals.” It follows that citizens and political actors are to be judged by their attitude to the new values and arrangements, and not by what they did in the past—this is the meaning of the plea to abandon distinctions “between the two classes of population.” This points to the second difficulty of denazification. The view of the past promoted by this policy tends to stabilize and to further deepen social, cultural and political divisions at a historical moment when unity around the democratic constitution should be the order of the day. The demand for unity is not anti-democratic. In practical-political terms, it points to the complex meaning of the category of integration. First, all German citizens should be united around, or integrated into the project of the democratic transition. Second, the German state should be integrated into the international democratic community.⁴⁵ This is to be achieved by drawing the line (*Schlußstrich*) between the past and the present in the corrective manner, that is, in a manner that will amend the exclusionary policies of the Allies.

With all this, the final argument against denazification is already in place. Such a comprehensive policy requires people to confront past wrongs not because they themselves committed them, but because they are Germans. Inflicting this duty of looking back on the whole society and all its members leads to imposing a sense of collective guilt, which is the

⁴⁵ “It is for us beyond any doubt that we belong to the West European world, both in terms of our heritage, and in terms of our orientations.” – Adenauer, “Erste Regierungserklärung...” Besides the requirement for the integration of Germany into the family of Western democracies, one can spot here one of the first formulations of the above discussed concept of the fundamental continuity with the “better past.”

pinnacle of injustice. In the final account, such a strategy creates a collective victim out of the whole nation on account of the identity shared with the perpetrators. It involves the suggestion that some, or even large, portions of the population acted in a morally unacceptable way. Even if this suggestion were true, an ex-post facto establishment of such a truth can have only devastating effects on our identities. Those who are guided by the intention to demonstrate our moral responsibility for the past practically promote the category of collective blame, hence accusing both the collective of co-nationals as a whole, and each individual belonging to the collective. Consequences are likely to be devastating, because the same people who are expected to interiorize, as democratic citizens, new moral, cultural and political values, are locked in the past, burdened with the mark of guilty subjects. Simply put, people are made hostages of the detrimental past, and they are forced to carry the weight of uncontrollably spread guilt. In this way they are practically denied the moral capacity to affirm their individual autonomy and freedom, and to live and act as equal citizens in advance.⁴⁶

In addition, it is unrealistic to expect people to be able to respond to this duty in the manner preferred by authorities who create it. The moral argument of injustice thus leads to the context-specific argument of unmasterable burden.

2.2.3 *Unmasterable burden*

Theodor Adorno opens his statement against oblivion with an acknowledgement of the strength and appeal of one's desire to forget:

One wants to get free of the past: rightly so, since one cannot live in its shadow, and since there is no end to terror if guilt and violence are only repaid, again and again, with guilt and violence.⁴⁷

Indeed, yearning for normalcy is one of the most powerful human inclinations. If, after traumatic events of the recent past, people were required to internalize the knowledge and explicate their feelings towards the events

⁴⁶ For an analysis of the use of the category of collective guilt in the German postwar politics, see Norbert Frei, *1945 und wir. Das Dritte Reich im Bewußtsein der Deutschen* (Munich: Verlag C.H. Beck, 2005), 145.

⁴⁷ Theodor Adorno, "What Does Coming to Terms with the Past Mean?" in Geoffrey Hartman (ed.), *Bitburg in Moral and Political Perspective* (Bloomington: Indiana University Press, 1986), 115.

in which they in some way participated,⁴⁸ would it not lead to a vicious circle of its repetition? Or, is it not realistic to expect that both individuals and the whole of society would crash if exposed to the pressure of painful and disturbing memories? Most human beings certainly could not live peacefully in full awareness of this kind of burden. Then, is closing the books on the past not the only rational way of healing the inflicted wounds, and of creating a future in which normal—peaceful, civilized, democratic—life would again be possible?

After the atrocities people are simply “not ready” to face the facts, because for many of them it would mean acknowledging their own blameworthy attitudes and behavior. Empirical studies confirm this: fake ignorance is observable as a mass defensive reaction. Causes of such literal denial are different, and they can be classified as personal or group-specific, psychological or cultural, justifiable or unjustifiable.⁴⁹ Following Stanley Cohen, this literal denial of the known facts can appear in two basic forms. First, people know the truth, but they still decide to deny it: they deliberately make deceiving assertions. Second, there are cases in which people are not only unaware of the truth, but are also unaware of their own attempts to conceal the truth.⁵⁰ This may sound insufficiently clear, but the reference is both to the personal states of mind, and to the historically well known situations exemplified by behavioral patterns which could be provisionally identified as states of self-imposed ignorance. For example, in Germany after 1945, many people who did not know of each other were using literally the same formulations of ignorance when trying to explain their attitude to the mass disappearance of their Jewish neighbors.⁵¹ They preferred not to think about what happened, accepting instead silence and avoidance of reality in a manner which could be described as unreflected or even sub-conscious. At work is a spontaneous mass denial, which appears in the form of a poorly reflected intention to forget.⁵² These are complex defense mechanisms, and

⁴⁸ The meaning of indirect participation in collective crime is discussed in Chapter Four.

⁴⁹ Exploring these and related reasons for denial provides a fascinating field of study. While such a systematic analysis remains beyond the scope of my approach, I am pointing to some insights offered in Chapter One, and, in particular, to the analyses of the cultural and psychological reading of the inability thesis, which is the subject of Chapter Three.

⁵⁰ Cohen, 3–4.

⁵¹ Giordano, 36.

⁵² Peter Graf Kielmansegg, *Lange Schatten. Vom Umgang der Deutschen mit der nationalsozialistischen Vergangenheit* (Berlin: Siedler, 1989), 44.

the fact that they are unjustifiable should not lead to their immediate depiction as deliberate lies, because this would only blur analytical insight into the problem.

This appears to be the type of situation in need of a psychological approach. Indeed, there exists an abundance of literature that tries to explain attitudes to crime that prevail after the change by presenting politics and the culture of denial as inferences of the psychological condition prevalent among people in whose name crimes were committed. This approach has offered some valuable insights into the mechanisms and consequences of silence and denial, by using psychoanalytical categories of guilt feeling, sub-consciousness repression of memories, transference, traumatic stress, etc. However, in the next step, the damaged psychology of individuals is typically presented as damaged individual morality, which in turn is assigned the role of being a base for both the collective psychology and political culture (though poorly distinguishing one from another).⁵³ There are two possible politically relevant readings of the human condition thus understood. In one interpretation, this is the very reason to address the past: acknowledgment and mourning are prerequisites of a democratic political culture. If people do not confront their recent memories, society would be reduced to a collective consisting of psychologically and morally damaged individuals. Consequently, democracy would be doomed to failure, since this arrangement cannot properly function without a supportive political culture and without autonomous individuals capable of self-reflection.⁵⁴

But, reference to the damage done to the human psyche under the populist criminal regime can also lead to an opposite view of what is the appropriate political response. According to the second approach, the elementary psychological condition of longing for normalcy after years of

⁵³ Perhaps the basic shortcoming of this approach consists in the mechanical application of the categories which psychoanalysis developed for the purpose of a better understanding of the human psyche, on the exploration of collectives, culture, and political action. More interesting are analyses which do not simply argue that "psychological is political," but try to combine psychological, cultural and political approaches with the issues of denial, silence, and guilt, and their relation to democracy. Besides Stanley Cohen's book, interesting efforts include: Alexander und Margarete Mitscherlich, *Die Unfähigkeit zu trauern. Grundlagen kollektiven Verhaltens* (Munich: Piper, 1977); Gesine Schwan, *Politik und Schuld. Die zerstörerische Macht des Schweigens* (Frankfurt: Fischer, 1997).

⁵⁴ Gesine Schwan, "Political Consequences of Silenced Guilt," *Constellations*, Vol. 5, No. 4, 1998, 475.

repression develops into a kind of cultural group attitude. People who under the old regime preferred the state of self-imposed ignorance, or those who realized the magnitude of evil but chose passivity and “inner emigration,” as well as those who were supportive bystanders, are all confronted with the naked truth after the change. This truth is not only the record of the regime’s wicked practices. It is also the truth about individuals themselves, and many people would react to it with the combination of the two attitudes that Stanley Cohen identifies as concealment of the truth and its rationalization. As I tried to show in Chapter One, this does not necessarily imply that such people should be seen as committed followers, ideologically indoctrinated fanatics, criminals or racists. Their attitude of denial, often referred to as the “syndrome of normal Germans” in the literature, was typically explicated as an unreflected loyalty to the regime and the “homeland.” After the transformation, such a stance is spontaneously preserved, this time as the collective defensive strategy of denial. It may not be a justifiable strategy, but the issue of justifiability is, strictly speaking, besides the point. According to the advocates of the politics of silence, this attitude deserves understanding—it is a cultural reality any transitional politics has to take into account.⁵⁵ People are simply not capable of meeting any requirement of reflection which would ask about their recent roles, actions, beliefs, and attitudes. If such a requirement is nevertheless publicly formulated, and made a part of the transitional politics, the population would react with contempt and refusal. They would become alienated from their polity, turning into disinterested, apathetic and disloyal citizens. This is something victors—for the idea of coming to terms with the sinister past always comes from victors—have to weigh up before deciding whether to publicly support the politics of memory or the politics of forgetting.

People in such a condition can at best be forced to pretend in public, by falsely acknowledging their comprehension of the recent misdeeds, and of their own moral ignorance. This is what Hermann Lübke calls the “politi-

⁵⁵ Before forcefully challenging this reasoning, Richard von Weizsäcker offers its precise summary in his memorable 1985 presidential address: “It was difficult to find one’s bearings straightaway. Uncertainty prevailed throughout the country [...] Most Germans had believed that they were fighting for the good of their country. And now it turned out that their efforts were not only in vain and futile, but had served the inhuman goals of a criminal regime. The feelings of most people were those of exhaustion, despair and new anxiety.” – Richard von Weizsäcker, “Address to the Bundestag During the Ceremony Commemorating the 40th Anniversary of the End of the War in Europe and of National Socialist Tyranny,” in Hartman (ed.) 1986: 262–263.

cal ritual of remorse.”⁵⁶ In other words, if the political strategy of forced coming to terms with the past is implemented, it will create either a culture of bad consciousness, or mechanisms of covert and overt modes of denial, or a peculiar cultural combination of both.⁵⁷ No society in transition to democratic normalcy after an evil past could withstand such a culture without considerable damage to the prospects of reaching stable democracy. Thus, in another text, Lübke introduces the concept of “communicative silence,” claiming that Germany was able to become a democratic polity only due to the tacit post-war agreement to silence the past. Having implicitly agreed to take a distance from the Nazi crimes, post-war Germans gained the capacity to both accept democratic values and to re-establish the links to the positive legacies of German history. Silence, then, does not equal avoiding the confrontation with the past; rather, it is a means through which members of a society establish a communicative relationship to the past: “A certain silence was a necessary socio-psychological and political instrument of the transformation of the post-war population into the citizens of the Federal Republic of Germany.”⁵⁸ A more general claim follows: only silence makes it possible to re-construct a fundamental continuity with the better past and its genuine traditions and values. This better past, as the repository of the true answers to the question of who we are, appears in turn as the bridge which integrates our political and group loyalties and identities with democratic patterns.⁵⁹

An allegedly empirical argument in support of the above claims states that the right approach to the given context should include considerations of timing. Memories of the past crimes are obviously most painfully felt immediately after the change. But this does not work in favor of dealing with the past. To the contrary, the force of politically and culturally unmediated memories is so destructive that people cannot manage any rational reflection on their meaning and consequences.⁶⁰ Morally and politically disoriented individuals, whose social status is often most severely

⁵⁶ Hermann Lübke, *Ich entschuldige mich. Das neue politische Bußritual* (Berlin: Siedler, 2001), 41–42.

⁵⁷ For an extensive critical reading of Lübke’s views, see Klaus Heuer, *Die Geschichtspolitische Gegenwart der nationalsozialistischen Vergangenheit. Zur Analyse unbearbeiteter Loyalitäten am Beispiel des Historisierungsansatzes von Hermann Lübke* (Kassel: Kassel University Press, 2001).

⁵⁸ Hermann Lübke, “Der Nationalsozialismus im deutschen Nachkriegsbewußtsein,” *Historische Zeitschrift*, Vol. 3, No. 236, 1983, 585.

⁵⁹ *Ibid.*, 585–594.

⁶⁰ Schlink, 95.

damaged by recent events, and whose view on the future is in consequence tainted by existential insecurity and fear, cannot be reasonably expected to understand the moral claims of either victims or victors. They will most likely react with a combined attitude of refusal and cynicism to any effort to compel them to reflect on the past. This stems from what is to be observed as one of the most difficult consequences of totalitarian rule: individual autonomy, understood as the ability to judge and act responsibly, which is based on one's capacity to distinguish between right and wrong, has been severely damaged in many people.⁶¹ They are typically not able to comprehend their place in the world, and social and political status under the old regime, or after the change. This implies that, in the wake of political transformation, they are not able to realize the connotation of their possible moral accountability for past crimes. If confronted with external pressure to deal with the past, their most usual reaction would be defensive self-victimization. This would further damage their ability to achieve individual autonomy and, consequently, to become citizens capable of meeting the requirements of democratic transition.

Thus, when the problem of dealing with the evil past is put into a time-context, the minimum requirement is to approach the question of timing differently from the manner that prevails in the literature on responsibility. With the exception of criminal responsibility, we should avoid raising the issue of the moral meaning of people's direct or indirect participation in crimes, until a new political culture based on individual autonomy is cultivated. This can also be read as a corollary argument of the generation-specific approach to the past. The claim is that reflective dealing with the past is not necessarily off the agenda, but rather that it can become possible only after a certain period of time has passed, and certain conditions are fulfilled. Antonia Grunenberg summarizes this argument:

It [mastering of the past] does not begin immediately after the events; it lasts for decades and it stretches over generations, being under the primary impact of contingent episodes and cultural-historical heritage. This is confirmed by the experience of the post-communist European countries and the apartheid regime in South Africa. A favorable overall political condition, absence of war, introduction of political liberties, hope in economic recovery, belong to the basic pre-suppositions of this process, as well as extraordinary personalities who initiate and lead the implementation of these processes [...] Most importantly, processes of mastering the past in post-totalitarian societies can be managed only to a limited degree; they unfold in different times and accidentally. These processes can neither be composed of, nor derived from, millions

⁶¹ Antonia Grunenberg, *Die Lust an der Schuld. Von der Macht der Vergangenheit über die Gegenwart* (Berlin: Rowohlt, 2001), 111–119.

of individual biographies and individual discourses, and they cannot be artificially harmonized.⁶²

The argument of a generation-specific approach to the past is supported here by two important claims. First, the reflective process of coming to terms with the past can unfold only upon meeting certain civilizational conditions. These conditions are understood as social, economic, political and cultural standards that make thinking and experiencing emotions about the criminal past feasible. They comprise, among other things, freedom from hunger, freedom from other socially, economically or politically induced existential obstacles and fears, stable arrangements of social justice, working institutions of political democracy, a legal system conducive of freedom, equality and security, as well as a cultural environment in which the values of human dignity, mutual respect, and toleration are scrupulously observed. Second, the process of dealing with the past cannot really be managed. Fulfilling the listed conditions depends on the particular historical context and its unrepeatable contingencies. It follows that after the evil past, every society has to find its own ways of reaching the state of civilized normalcy. It also follows that reflective confrontation with such a past should not—because it really cannot—be made part of these ways.

To establish whether normalcy is reached, we should apply the criterion of personal autonomy: if human beings have acquired, and in their daily behavior confirmed the status of individually, socially and politically responsible citizens, it can be concluded that they have become autonomous subjects. In turn, the existence of autonomous citizens capable of the responsible judgment signals as such individuals live in a normal, democratic, civilized environment.⁶³ Having become autonomous, these democratic citizens may decide to address past wrongs.

This does not imply that, once the conditions are met and the transition is completed, reflection on the past should necessarily take place. What really counts is a harmonious integration between individual autonomy and democratic institutional arrangements. Nobody can in advance, or at an abstract, context-free level argue that autonomous individuals in a de-

⁶² *Ibid.*, 119–120. Although I remain critical of the way Antonia Grunenberg formulates the choice between critical reflection on the past and democracy, I should emphasize here that hers is an extraordinarily valuable book. Grunenberg cannot be classified among writers who try to minimize the past. While her concluding inferences remain controversial, her analysis of moral and political implications of the past offers many precious insights.

⁶³ *Ibid.*

mocratic society will really need the reflection on the (now remote) disturbing past. While immediately after the regime change considerations of stability and justice would require that the fundamental continuity with our genuine collective self be preserved, and that individuals be liberated from the unmasterable burden, now it may turn out that there is no reason to deal with the past anymore. Coming to terms with the past is not of value in itself. It is meaningful only if it can perform certain functions and help us reach certain goals. Ours is a normal democratic community now, we are autonomous citizens, perpetrators have long ago been sentenced for their crimes. The upsetting history of the relationship of our community with the community of victims has been balanced, or even made into “a past that has passed,” by the decades-long democratic practices through which we have clearly, albeit implicitly, shown how different we are from the generation of the perpetrators and their supporters. We do not have to claim silence, nor do we have to fear a public presentation of the full knowledge anymore, for this past has become a matter of historiography: its safe havens are now museums, monuments and textbooks, and none of these sheltered places would require moral and political reflection from a specifically contemporary perspective. Sure, the other option—that of the reflective dealing with the past—is also possible. But it is important to reiterate that such a decision can be made only by autonomous individuals, that is, by democratic citizens, upon their free consideration of the social, political and cultural context in which they live. Plainly, no political, moral, or cultural obligation of coming to terms with the criminal past can be formulated in abstract and universalizable terms.

3 “We did Nothing Wrong”: Politics of Denial

Does the plurality of options we observe in transitions from the criminal past really mean that anything goes, that legacies can be politically interpreted in any manner we find appropriate, just, rational, or prudent? I intend to defend a negative answer to this question. Let me start with a particular claim about the transition, which combines empirical and normative elements. The claim is: while new elites differ in their attitudes and actions to the legacies of collective crimes, no transition from a criminal regime to democracy would deny that what happened recently was bad.

This is not a simple statement of empirical fact. We know of post-criminal regimes declaring their commitment to democratic transition, while at the same time denying the wrongness of past events. Note that this differs from denying the relevance of legacies, which I presented in

the preceding section: it is important to distinguish between public recognition of the wrongness of the crime followed by an assertion that no action is needed, or that acting would not be contextually appropriate on the one hand, and the claim that what happened was not wrong at all on the other. In the latter case, the subject of denial is the crime itself. What happened was something else than criminal practice. These events were not morally, legally, or politically wrong, and therefore the polity, after the regime change, cannot have any specific duty to confront the past. We did harm to nobody, and this is why we do not have to construct arrangements and practices of special justice. My normative claim is that the regime which in this way denies blameworthiness of recent wrongs is not in transition to democracy at all. Put simply, the refusal to acknowledge the character of the past deflates the worth of the regime's democratic arrangements and goals. This position can also be defended with analytical and empirical arguments, to demonstrate the failure of the transitional processes in societies whose political elites have denied wrongdoing. I will explain this stance by exploring the case of Serbia after the fall of Milosevic's regime.

The regime change of October 2000 in Serbia opened the possibility of beginning the transition from the condition of an authoritarian statehood towards constitutional democracy. The transition has failed. The character of the legal and political system, the relationship between the individuals and the state, economic processes, ideological patterns, prevailing cultural values, all reveal a regime and a society that have lost direction. Why is it so? The failure of the transition is not primarily a consequence of the poor choices of institutional design, or of incomplete, or biased implementation of that design. The basic point of the political conflict, which soon after the change led to the dissolution of the Democratic Opposition of Serbia,⁶⁴ was not merely the attitude to the future, but rather the relationship to the criminal past. The new democratic actors did not succeed in reaching even the minimum compromise on the interpretation of the past and the scope of transitional justice. Somewhat schematically, one can identify three basic types of the attitudes to the past after the fall of the regime of Slobodan Milosevic.

The first can be labeled the strategy of denial of past wrongs, based on the normative and institutional continuity with nationalism of yesterday.

⁶⁴ Democratic Opposition of Serbia (DOS) was a group of political parties and civic organizations which joined together in 2000, with the aim of winning presidential and parliamentary elections against Slobodan Milosevic, his Socialist Party and its satellites.

Its ideological core was formed by the calls for a defense of national identity and dignity, explicated through minimization or complete denial of the war crimes committed by the old regime, through insisting on the balance of “our possible responsibility for war” and “responsibility of the other side,” and a further affirmation of the old stereotype about the Serbian nation as a victim.⁶⁵ Politically, this strategy, shaped by the ideology of “legalism,” focused on resistance to the removal of the notorious officials of the former regime, obstruction of reform projects in parliament, and the effective protection of the indicted war criminals (presented as doubts about the lawfulness of the Hague Tribunal).

An opposed approach to the past was offered by a political option that can be named the quasi-pragmatic orientation to the future, or the strategy of closing the books for the sake of democracy. It was formulated within the anti-war liberal movement during the last months of Milosevic’s rule. The basic assumption was that the removal of the old regime, the establishment of democratic procedures and of market economy, together with putting an end to hate speech would be sufficient for the transition of Serbia from a corrupt nationalist regime into a decent democratic polity.

⁶⁵ Denial of crime appears in both literal and interpretive forms. Its agents can be found among political elites represented in parliament, media, intellectuals, and extreme right-wing organizations. For an example of the ruling elites’ relativist attitude to the legacy of past crime see the BBC interview with Vojislav Kostunica, then-President of Yugoslavia, in “The West Morally Obligated to Pay for Yugoslavia’s Reconstruction,” *Newsnight*, 28 November 2001, available at <http://news.bbc.co.uk/2/hi/events/newsnight/1685633.stm>.

There exists a group of self-styled “patriotic media,” heavily engaged in spreading and defending “the truth about the recent past” (see for example the dailies *Kurir*, *Glas Javnosti*, *Politika*, the weekly newspaper *NIN* and many TV channels). Perhaps the most interesting intellectual forum focused on “defense of Serbian national interests” is the web page of the academic journal *Nova Srpska Politicka Misao* [New Serbian political thought] at www.nspm.rs. Allegedly faithful to principles of analytical accuracy, academic impartiality and honesty, contributors to the NSPM are engaged in topics ranging from a demonstration of the continuous existence of an international conspiracy against Serbia (e.g. Dragana Matovic, “Proslost pred nama” [The past in front of us]), to a denial of the Srebrenica massacre (e.g. Aleksandar Pavic, “Was the ‘Srebrenica Genocide’ a Hoax?” available at http://www.wnd.com/news/article.asp?ARTICLE_ID=55467).

Extremist organizations that either negate recent crimes or openly support them, advocate the politics of hatred toward other nations and “non-Serbian” minorities (particularly homosexuals), and call for a new “holy war” include: *Obraz*, available at <http://www.obraz.org.yu/eng/eng.htm>; *Dveri Srpske*, available at <http://www.dverisrpske.com>, and *Vidovdan*, available at <http://www.vidovdan.org>.

Thematization of the issue of the attitude to the past was rejected as a moralistic obsession, which allegedly stood in the way of the rational strategies aimed at achieving democratic normalcy.

The third strategy was focused on what its actors understood as the proper sequencing of steps. It was embodied in the reformist political position and actions of the first post-regime change Prime Minister Zoran Djindjic and his Cabinet. Pragmatically oriented towards the design and implementation of economic and political changes in a space significantly narrowed both by the inherited societal condition and by the impediments created by political opponents, the reformists never denied the necessity to confront the crimes. They however assumed that institutional stabilization should come first. This government made an important contribution to the break with the past by its resolute policy of cooperation with the Hague Tribunal: Slobodan Milosevic was arrested in March 2001, and sent to the Hague. Still, reformists failed to realize the full moral and political weight of the past.⁶⁶ This became tragically obvious in March 2003, when Prime Minister Djindjic was assassinated by high-ranking officers of a special police unit of the old repressive apparatus, which, despite its notorious role in the war crimes, continued to exist after the change.

Deprived of a legitimate constitutional system and a minimum value consensus, post-regime change Serbia was thus reduced to the scene of a battle for the diffuse support of the “people.” In such a context, the reformists were forced to adjust their projects to the limitations imposed by the rudimentary façade statehood inherited from the preceding period. In this Hobbesian struggle for legitimacy, within the framework defined by the domination of the collectivist political culture, attempts to justify reforms through the liberal constitutionalist discourse were defeated by a legitimizing matrix based on the already deeply rooted core of tribal nationalism.

⁶⁶ “The sequencing of steps is as follows. First, we have to open international channels, through which we will become a part of the world market of capital and technology, and through which the international market will become accessible for our economy. Second, we have to reform laws and institutions, to attract considerable foreign investments. Third, we have to reconstruct our companies. At the same time, we have to build efficient public services, in state administration, police, health care, and education... We know it is impossible to avoid the cooperation with the Hague tribunal. It is as natural as the change of seasons. We have winter, and summer, and we have to come to terms with that. Our goal is the European integration, and, to achieve it, we are ready to pay any reasonable price. Thus, we say to Serbs: we have to send these people to the Hague. There is no alternative.” – Zoran Djindjic, *Put Srbije u Evropu* [Serbian road to Europe], ed. by Zivota Ivanovic (Belgrade: Draslar Partner, 2009), 77, 159.

The first strategy—that of continuity with the nationalism of the past—won out. The outcome was due to the combination of a blockade of institutional reforms and the preservation of the core nationalist ideology. Serbia is one of a handful of transitional countries that for many years after the regime change failed to commit to changes to its old constitutional system. A comparative analysis of democratic transitions shows that the process of change typically opens with constitutional revisions that aim to reform political institutions, establish the rule of law and guarantee the primacy of basic rights.⁶⁷ Serbia is in this regard an exception, as a country that preferred to simply keep its authoritarian constitutional setup intact.⁶⁸ This inactivity was justified by a discourse of “legalism.”⁶⁹ “Legalism” in the Serbian political usage should be differentiated from the term “legality,” which points to the generality and transparency of the legal system and to the duty of both government and citizens to always act in accordance with law. Understood in this sense, legality is a feature of the modern concept of constitutionalism, which provides for depersonalized, neutral and responsible state authority and for the effective protection of equal basic rights. Legalism in post-Milosevic Serbia stands for the exact opposite. It is the ideological basis for a practice in which a personalized, partial and irresponsible

⁶⁷ See, for example, Andrew Arato, *Civil Society, Constitution, and Legitimacy* (Lanham: Rowman & Littlefield, 2000). For a theoretical argument about the importance of the proper timing of constitution-making, see Bruce Ackerman, *The Future of Liberal Revolution* (New Haven: Yale University Press, 1992); Ulrich Preuß, *Revolution, Fortschritt und Verfassung. Zu einem neuen Verfassungsverständnis* (Berlin: Klaus Wagenbach, 1990).

⁶⁸ The new Constitution of Serbia was enacted in November 2006. The constitutional text was drafted in haste, behind the closed doors of the parliamentary constitutional committee, and then immediately put to a referendum—effectively depriving citizens of any possibility of being informed about the content of the draft. The political background for this move was clear. Announcing the beginning of the constitution-making process, then-prime minister Vojislav Kostunica emphasized that “we need a new Constitution in order to define Kosovo as an integral part of Serbia [...] In this way we will send an unambiguous message to everybody that the state of Serbia is in all discussions about the status of Kosovo bound only and exclusively by what is written in its Constitution” – “Kosovo kao deo Srbije u ustavu,” [Kosovo as a part of Serbia in the Constitution] *B92 On-Line News*, 12 September 2006, available at <http://www.b92.net/info/vesti>.

⁶⁹ The analysis that follows shows that the interpretation of the concept of “legalism” in Serbia does not fit Judith Skhlar’s understanding of this category as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.” Judith Skhlar, *Legalism: Law, Morals and Political Trials* (Cambridge, Mass.: Harvard University Press, 1964), 1.

state authority creates the conditions for socio-political insecurity and routine violation of basic rights. In Serbia, legalists are those who identify themselves as defenders of the legal system in a political context in which the law is corrupted by the practices of illegal behavior. Consequently, they claim to be in opposition to those political actors who do not abide by law. However, an impartial view of the recent Serbian “battle for legalism” demonstrates that its essence is not the commitment to constitutionalism and the rule of law. Rather, its essence is defined by its purpose: to publicly denounce political opponents as lawbreakers. In this strategy, the identification of political opponents comes first. In the next step, “legalism” is used to demonstrate that the opponents have engaged in anti-legal behavior. In a word, “legalism” functions as a political instrument of disqualification. Its true essence is ideological, and its purpose is defense of the normative core of the Milosevic regime’s legacy. Rooted in an ideology of “care for the people” in the manner of 19th-century romantic nationalism, the legalists have failed to realize that after a criminal past this particular traditionalism is incompatible with the demands of the rule of law. In trying to reaffirm “traditional values,” “national honor and dignity,” “our genuine identity” and the like, they have ended up as the advocates of the institutional and ideological legacies of resentment nationalism.

The normative stance behind the victorious practical-political attitude to the recent past in Serbia is the assumption that Serbs did not commit crimes: even if their actions caused harm and suffering, they are politically and morally justifiable. The ensuing interpretative practice has created disastrous consequences. A look at Serbia today shows that political, social and cultural dynamics in this country have been decisively shaped by the political and societal denial of the crime. Denial functions as the refusal to acknowledge the true character of what is known to have happened. In consequence, after the assassination of Prime Minister Djindjic, the worst legacies of the past have re-surfaced: refusal to accept any responsibility of the Serbian regime and the Serbian people in the crimes committed in Bosnia, Croatia and Kosovo; preservation of the destructive core of tribal nationalism, disguised as the affirmation of “genuine traditions” and “true identity”; promotion of the war criminals to the pedestal of national heroes. Moral responsibility has been vehemently denied, while feeble attempts to raise the question of political responsibility were rejected by the nationalist opposition;⁷⁰ refusal to accept criminal respon-

⁷⁰ Following Djindjic’s assassination, the liberal Civic Alliance party initiated a lustration law to vet the state apparatus of those individuals who held important positions under

sibility of the perpetrators accused before The Hague Tribunal has become the measure of patriotism.⁷¹ Public discourse is colonized by the authoritarian friend-foe pattern, foes being non-Serbs, the international community, and those individuals and organizations in Serbia who argue that the book of the past should not be closed, and who insist that the road to democracy for this country requires both condemnation of the crimes and the explicit renunciation of the legacies of tribal nationalism.

The overall result is the preservation of factual and moral ignorance among the population.⁷² Shortly, the refusal to reflect on the past has greatly contributed to the political and normative confusion, which has effectively destroyed the democratic promise of the regime change. Both citizens and political elites are prisoners of the past. Of course, only a minority of political and social actors would explicitly support the old regime and the outcomes of its rule, but an analysis of the political processes and the prevailing value orientations reveals the practical engagement in a preservation and further re-production of essentially the same institutional and ideological patterns.

Contemporary Serbia vegetates among the ruins of the communist and nationalist regimes of yesteryear. Its rulers seem to believe that the democratic building can be erected using the old and broken bricks and roofing-tiles. Such a feeble imitation of democratic transition is possible only thanks to the elites' preference to keep the country in the past. Arguing

the Milosevic regime, especially in the army and the police. In June 2003, the Serbian parliament passed the Law on Accountability for Human Rights Violations. This lustration law was never implemented, because MPs from the nationalist parties prevented the election of the commission that, according to the law, was to assess the involvement of officials in human rights violations.

⁷¹ According to a December 2009 public opinion survey conducted by the Belgrade Centre for Human Rights, 72 percent of respondents hold a negative attitude to the Tribunal; in specifying reasons for this attitude, respondents claim that the Tribunal is partial, anti-Serbian, illegal, or that it is under US influence. Further, 55 percent believe that Radovan Karadzic is not guilty; 64 percent believe that Ratko Mladic should not be arrested and sent to the Hague, available at <http://www.e-novine.com/mobile/drustvo/33006-Veina-graana-Srbije-protiv-izruenja-Mladia-Hagu.html>.

⁷² In a 2004 poll exploring attitudes toward the Yugoslav wars, only 50 percent of respondents claimed to have heard that Sarajevo had been under siege for over three years, of whom only 40 percent believed the siege happened, and only 16 percent agreed that those events involved war crimes; 71 percent heard about the discovery of mass graves of Albanian civilians killed in 1998–1999, of whom 31 percent believed it to be true and 25 percent agreed that it was a war crime. – Igor Bandovic (ed.), *The Activity of ICTY and National War Crimes Judiciary* (Belgrade: Belgrade Centre for Human Rights, 2005), 336.

that at work is an effort to keep the pillars of the discredited past alive, does not contradict the claim that Serbia refuses to deal with recent events. The paradox is easy to resolve: the past defended by today's elites has never been. In terms of the truth-value, the dominant representation of the past is only a chimera. In political terms, this is a revisionist program that shapes and guards a new version of the ideology of mythic nationalism: recent atrocities are to be reinterpreted in a manner that integrates them into a new positive representation of the national identity. The case of Serbia demonstrates the capacity of the political and cultural elites to construct a false interpretation of the past, and to designate it as genuine tradition. Once the instruments of the official discourse are captured, any attempt to question the results of this ideological engineering is declared as a betrayal of the national interests. The false interpretation of the past becomes the legitimizing tool of the regime, "the basis for the contemporary political legitimization of guaranteeing and denying rights, and social inclusion and exclusion."⁷³ This is only a continuation of the moral and political relativism of Milosevic's regime.

Let us not forget: the subjects of this ideological revision of history are the crimes committed in the name of the Serbian nation. Such an enterprise of falsification, the comparative experience teaches us, can never fully succeed. But in the Serbian case it has created gloomy effects. Society is deeply divided in consequence of the war, atrocities, and the political and cultural misuse of their perception. The wall of silence and denial built around the recent past only maintains the political and cultural condition in which there are too many people who are either incapable or not ready to distinguish between right and wrong. The line between truth and lies about the past is unclear, and lies are thus easily translated into a manipulative political discourse. Instead of recognizing the true victims of the crimes, Serbia has preserved the old narrative of self-victimization, which continues to serve as a repository of the right-wing political options, from the Serbian version of liberal nationalism to the Serbian version of street fascism.

4 A Summary

A political strategy of silence is wrong on at least three important counts. First, its general argument of the vulnerability of democracy offers an essentially idealistic comprehension of the relationship between the past,

⁷³ Srdjan Vrcan, "Kultura kao drustveno opasan pojam" [Culture as a socially dangerous concept], *Rec*, No. 61, Vol. 7, 2001, 109.

the present, and the future. Expressly or implicitly, it relies on the idea of a new beginning, where the act of the regime change is perceived as an absolute watershed between a “then” and a “now.” This is wrong:

Mentioning rupture, discontinuity, or even zero-hour in a historical process is always very tricky... Whoever speaks about rupture, can argue only about the relationship between reality he or she experienced, and patterns of their interpretation. If, in the course of great historical events, like revolutions and wars, institutional order of a society breaks down, images, symbols and mentality through which the old regime used to secure loyalty of its subjects most often survive.⁷⁴

Contrary to the claim of its supporters, the official policy of “closing the books” cannot work as a pragmatic forward-oriented strategy. It rather comes down to a sort of “negative idealism,” which assumes that the line between the past and the present can be drawn at will. This cannot be done. Analytically, the recent atrocities influence the way we live today. Their character, magnitude, and legacies are such that they *cannot* be willfully erased from collective memory, nor disassociated from the present. In a normative perspective, collective crimes *ought not to* be forgotten. The fact that it was possible for such things to happen outlines the range of necessary paths of dealing with the past. We have to reflect on past atrocities, and we have to condemn them. This is not a moralistic stance that would depart from a metaphysical perspective of an abstract moral truth, to end up with posing unmasterable demands on ordinary people. Rather, this is the minimum requirement of practical morality—without meeting it, a post-criminal society would remain caught in the past. I will return to this claim in Chapter Four.

Second, a politics of silence does injustice to victims and their communities. There is something deeply troubling and wrong in an indifference to the recent sinister past on part of those individuals who share their group and communal identities with perpetrators of mass crimes. In words of Chadran Kukathas, to argue that such a past does not matter, comes down to arguing that grave injustices committed do not matter either.⁷⁵

Third, this strategy exculpates individuals who should not be exculpated. The regime change cannot possibly turn those who until yesterday voluntarily supported killing into decent persons. After the change, most bystanders remain caught in the same malady that defined them during the

⁷⁴ Dubiel, 58.

⁷⁵ Chadran Kukathas, “Responsibility for Past Injustice: How to Shift the Burden,” *Politics, Philosophy & Economics*, Vol. 2, No. 2, 2003, 172.

crime: call it a lost sense of justice.⁷⁶ This category, to which I return in Chapter Four, refers to the widespread moral corruption, which is stabilized in different patterns of moral indifference, tolerance and support for crime during the life-span of the regime. After the regime change it transforms into multiple strategies of denial of one's knowledge and involvement. Some people will stick with the claim that the crime did not happen at all; others will argue that they did not and could not know what was happening; some, while admitting that many people were killed, will interpret these events not as crimes but as legitimate acts; yet others, while admitting that wrongs were indeed committed, will insist that those were regime crimes, which cannot be meaningfully linked with "ordinary people." Intellectual and political elite will also oscillate between literal and interpretative denial, a culture-specific reading of unmasterable burden, and policy-oriented claims of primary importance of normalization and stability. These strategies, explored in detail in Chapter Three, reveal that yesterday's "ethics of evil" leaves as its most troublesome legacy a political culture in which there are too many people engaged in self-deception. Such people do not merely refuse to acknowledge elementary facts about crimes—they refuse to comprehend distinctions between right and wrong.

These and related problems question the viability of silence and denial: after the breakdown of a wicked regime, when it looks as if the victors enjoy unconstrained capacity to contemplate any kind of a new beginning to redirect the course of history, they should rather start exercising their powers in a manner of a careful reflection on circumstances created by recent wrongs. But, how exactly should this "reflective attitude" be comprehended, what are its features, which types of approaches to the past and specific actions can it accommodate, who would be its agents? Walter Benjamin's instruction to historians may be used here as a statement that has a broader methodological bearing:

To articulate the past historically does not mean to recognize it "the way it really was" /Ranke/. It means to seize hold of a memory as it flashes up at a moment of danger.⁷⁷

Benjamin's "danger" refers to a time confronted with a looming catastrophe, but the warning is applicable to the post-catastrophe time as well.

⁷⁶ My use of this category is inspired by Jonathan Allen, "Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission," *University of Toronto Law Journal*, Vol. 49, No. 3, 1999, 337. For a more detailed exposition, see Chapter Four.

⁷⁷ Walter Benjamin, "Theses on the Philosophy of History," in Walter Benjamin, *Illuminations* (New York: Schocken Books, 1968), 255.

Memories are flashing up in *Jetztzeit*, and he who wants to understand the present, “grasps the constellation which his own era has formed with a definite earlier one.”⁷⁸ We live in a historical context, in which the very same past we aim at working off informs the character of the present, the possible range of meanings we assign to our lives, the scope of political choices we can make, as well as the ways in which we can conceptualize the future and the paths of attaining it. Rather than being a deterministic assumption, this is a claim to the effect that the legacies of the unprevailed past are important features of the individual, group and of collective identities, as well as of the scale of possibilities for a new political community.

It may follow that proper understanding of the contemporary perspective is a crucial challenge for anyone who contemplates the meaning of this kind of past. The normative premises of interpretations of the past and the present can be very different from one another, but the analytical starting point should nonetheless be the insight that what we want to overcome is integrated into our new context. This consideration is at hand, and it is both sociologically sound and normatively pertinent: democratic transition from an evil past is shaped by the continuity between the discredited past, post-regime change condition, and the preferred democratic future. The existence of this continuity is as simple and unambiguous as our intention to overcome it and to break away from the sinister past. But, our preference for creating a decent society, regardless of how genuine it is, cannot be met, and discontinuity cannot be achieved by looking forward only. In order to be able to conceptualize a democratic future, and ways of its coming into being, we have to depart from a critical normative representation of the past, and of its contemporary meaning.⁷⁹

Therefore, to undertake a reflective “seizing hold of memory” from a specific contemporary perspective, or to approach the past from the right interpretative stance means to be informed by the knowledge of where we stand after the break, an insight into moral challenges we are confronted with, our preferences regarding what we want to achieve, and the reflectively obtained position on who we want to become. The right interpretative stance should demonstrate our ability to identify both the analytical and normative questions, and to reach answers that will be both true and liberating. This perspective should not merely create the socially and politically relevant knowledge of the historical bond between the past and

⁷⁸ *Ibid.*, 263.

⁷⁹ Chris Lorenz, “Historical Knowledge and Historical Reality: a Plea for ‘Internal Realism,’” *History and Theory*, Vol. 33, No. 3, 1994, 298.

the present. It should also bring to consciousness the fact that the past is placed into the present in a manner which urges us to understand both what happened, and how it shapes, or ought to shape our normative expectations. In this view, retrospective confrontation with the past is a feature of moral and political self-perception of the community and its citizens. It aims at revealing values that in the new polity should enjoy primacy, the ways of achieving them, as well as the ways of re-creating identity patterns to answer the questions how we as citizens of the morally tainted polity should treat each other, and how we expect to be treated by others.⁸⁰

⁸⁰ Jürgen Habermas, "Warum ein "Demokratiepreis" für Daniel J. Goldhagen? Eine Laudatio," *Die Zeit*, 12/1997, available at: <http://www.zeit.de/archiv/1997/12historie.txt>. 19970314.xml.

Chapter Three

Culture, Knowledge, and Collective Crime: Reading Relativism

1 Introduction: Crime-specific Culture

In Chapter Two I explored some typical arguments against authoritative dealing with collective crimes. Some of them are formulated as specific policy concerns. In some other arguments references to culture play a prominent part. Most of those who oppose dealing with the atrocious past would agree on the empirical insight that culture in transition is tainted by legacies not supportive of democracy: the culture is problematic; the problems are crime-specific. But rather than being taken as an incentive to act, post-criminal cultural uncertainties are interpreted as a basis for the political decision to limit transitional justice or to close the books altogether. The analysis in the preceding chapter shows that such culture-specific arguments can be both analytical and normative. The arguments explored all claim that the character of culture in transition makes it prudent not to take an official stance on the past. This is not a fatal concession, proponents of the politics of silence argue, because the culture will undergo a transformation in the process of forward-looking democratic transition.

In this Chapter I want to show why this view of post-criminal culture does not hold. The claim is simple: cultural legacies of crime are not merely present; their presence in transitions is relevant in a manner that requires some action. I do not argue that all transitions from collective crimes demand addressing cultural legacies through policy choices and authoritative actions. It is perhaps more appropriate to address culture at the level of civil society, through different modes of action of its multiple agents. Still, in Chapter Two I made the following state-specific claim: after collective crime, a politics of inaction cannot be justified as a prudent, transition-supportive pacification of past cultural beliefs and attitudes, and their contemporary legacies. Put simply, looking forward after mass atrocities does not dismantle the crime-supportive culture. This is

due to both analytical and normative reasons. Analytics of the transitional culture following a difficult past may depart from empirical insight: no such thing as the spontaneous evaporation of cultural legacies has ever happened in democratic transition. Different analytical strategies can be applied to address the question “what do we have when we have the post-criminal culture.” Still, I believe that at least one analytical inference is beyond dispute: the culture in transition from a populist criminal regime is tainted by yesterday’s majority support for criminal practices. Taking the normative view, and on the basis of the analyses offered in the preceding chapters, one can perhaps make an even stronger claim: after the change, the crime and its legacies are the principal points of group identification. Group members are certainly still bound by the conventionally understood intergenerational common culture. But the common culture, traditions, memories, ethnic identity are now all impregnated by the crime. Our group identity—indeed, our national identity—has become a crime-specific identity. Hence, opting for silence about yesterday’s and today’s problematic culture amounts to two concessions. First, we tacitly agree to remain caught in yesterday’s cultural malady; second, by means of our choice we declare that injustice done in our name does not matter.

While the term “politics of silence” refers to political actors and to policies designed and implemented by authoritative decisions aimed at removing discussion about the past from the public sphere, “culture” denotes patterns of action and evaluation whose temporal and formal points of establishment most often cannot be identified, and which are not legally valid and politically authoritative. For the purpose of the present analysis, “culture” will be understood as the mode of life of a social group or community shaped by standardized procedures and normative requirements that regulate relationships, attitudes and actions.¹ As the analyses put forward in Chapters One and Two show, denial is the main crime-specific cultural attitude in the populist criminal regime and in its aftermath: dominant culture under both regimes is the “culture of denial.” This term covers the attitudes, beliefs, and normative patterns of action of people who in populist criminal regimes formed a peculiar “silent majority” supportive of the regime and its criminal practices, and have kept this cultural blueprint alive after the regime change.

This introductory identification implies continuity between silence under the populist criminal regime, and denial during democratic transition.

¹ Michelle Moody-Adams, *Fieldwork in Familiar Places. Morality, Culture, and Philosophy* (Cambridge, Mass.: Harvard University Press, 1997), 83.

Two important inferences follow. First, the logic of this cultural pattern in the transitory period cannot be properly conceptualized without comprehending how it developed and stabilized in the preceding period. To understand why so many people after the change so often prefer not to reflect on recent crimes, or even stick to blatant lies, we need to see why they held to a comparable preference under the old regime. Second, the sources of the two temporally defined subtypes of the culture of silence, forms of their (self-)justification, their features, functions, the character of their relationship to the regime and, finally, the types of their relationship to crime, though in many regards similar, do not overlap.

In both regimes, at stake is the rejection of the truth. It happens either through literal denial of the existence of a crime (“it did not happen”), or through different forms of interpretative denial, ranging from claims of ignorance regarding the facts, through claims of inability to comprehend or to act, to claims of the justifiability of the crime. Given that in both regimes this refusal becomes stabilized in recognizable patterns of attitudes and actions, it amounts to more than a spontaneous, one-off refutation of the duty to take the morally right stance on a wrong practice. Silence and denial work as social norms, and as processes of their implementation. As social norms, silence and denial prescribe expected and culturally allowed modes of belief, evaluation, and action. As processes of implementation, they are sets of binding routines of action—communicative patterns that shape both the normative framework of the relationship between the regime and its subjects, and the relationships among subjects themselves. Let me provide a short summary of the ways in which this culture of silence and denial works in the two regimes.

In the populist criminal regime, the culture of silence and denial is one of the most important aspects of collective crimes, second only to the misdeed itself. It is a particular form of complicity that ultimately makes the criminal regime and the atrocities possible. It consists of emotional, cognitive, and behavioral patterns, which are shaped and confirmed through a variety of overt and tacit strategies of support for the regime. While the official ideology will provide a peculiar binding ethical framework of thought, belief, and action, it will also expect its subjects to “independently” adjust to that framework, by demonstrating attitudes, emotions, and actions supportive of its rule. In particular, the populist criminal regime requires its subjects to voluntarily deny the moral wrongness of its practices. Denial as a social rule defines and regulates the required and allowed subjects’ attitudes to the regime’s actions, and it acquires the form of two only seemingly opposed requirements: sometimes the regime

will require an explicit positive attitude, while in some other situations literal silence and denial will be called for. As I tried to explicate in Chapter One, strategies of the first type include voting for the regime, participating in public manifestations of support, obeying laws and orders (even if such acts are clearly discriminatory or criminal), loyally discharging one's professional duties in the workplace (even if such duties are obviously linked with the reproduction of the regime—examples range from working in the state administration to working in military, and military-related industries). The second strategy covers the crime itself, and it transpires typically as silence, or people's withdrawal from expressing their views, deciding instead to remain passive, or mute. Ultimately, both types of stance required from the subjects are aimed at reducing them to a shapeless mass of obedient individuals who always speak and act, or remain silent and passive, in a manner orchestrated by the regime.

Second, in the transitional context, this culture denotes a group's attitude to the past regime, the mass crimes committed, and their consequences.² In difference to the previous period, the interplay between force and voluntariness, explained in Chapter One, ceases to be relevant. The dominant cultural pattern now consists of the empirically observable rejection on the part of the majority to confront the elementary facts of the recent crimes, and includes different modalities of emotion, evaluation, and behavior related to past wrongs. Since the totalitarian pressure and manipulation that had aimed at creating and maintaining support for the crime are not present anymore, the culture of silence and denial appears to be a matter of choice. However, as the attempts to justify this pattern explored below demonstrate, this is not as straightforward as it might seem.

A complete analysis of the culture of denial would require addressing its origin, agents, ways of establishment, reproduction, and justification. But, my primary aim is not to explore the logic of formation and modalities of reproduction of the crime-related culture under the two regimes. The bulk of the analysis is devoted to a critical encounter with the argument challenging the ability of individuals to preserve their moral autonomy under the severe conditions imposed by a criminal regime. This argument can be seen as a species of a more general one, which disputes the very core of an autonomy-based approach to the individual and his or her status in society, thus ultimately rejecting the relevance of the individual moral stance in the explanation and evaluation of social processes. While this argument appears in many disciplinary guises, its core can be identi-

² *Ibid.*

fied as relativism—a view that one's thoughts and actions can be explained and assessed only relative to the social and cultural context in which one lives. In the context of crime, the relativist argument acknowledges the continuity of the problematic culture, but proceeds to argue that its agents are not morally blameworthy: the culture in a criminal regime has a capacity to mold individuals to the point of canceling out their autonomy at its disposal. This claim has important consequences for the perception of the post-criminal condition. If relativism succeeds in arguing that denial under the criminal regime was not blameworthy, the central transition-specific inference is that wrongdoers and bystanders are not responsible for their past attitudes and actions. Accordingly, there exists no justified ground for a moral criticism of silence and denial in transition. The argument does not refute that what happened was wrong, nor that crime enjoyed majority support; it will not deny that many of yesterday's supporters, who have become democratic citizens after the regime change, stick to their wrong interpretations of crime. Still, the claim is that such people, due to the character of the cultural context, were not co-responsible for crime; hence, they cannot be called to account today.

A critical reading of relativism is in the focus of this chapter. I will be going back and forward between the philosophical position of moral relativism and the alleged empirical position of cultural relativism. While this strategy may seem odd, I believe that it can be justified by pointing to the interrelatedness between the two positions. A particular feature of this close link is the incompleteness of both sets of arguments. Philosophical relativism provides a highly abstract reasoning, while simply assuming its empirical support in the form of a background social thesis. On the other hand, cultural relativism uses extensive empirical data that, however, work as evidence only against a background set of intuitive normative assumptions. The two relativist views on collective crime stand or fall together.

This introduction (Section 1) is followed by four more sections. Section 2 presents the relativist argument. It first addresses the issue of the interplay between culture and the way individuals think and act—the question concerns the character of the causal and normative bond between culture and agency. Having identified the challenge collective crime poses to relativist thinking, I proceed with a short analysis of moral relativism as a philosophical position. Section 3 deals with the relationship between societal culture and attitudes to crime held by the members of the group in whose name atrocities were committed. The issue is whether the dominant culture can really shape individual personality in a manner that would

effectively deny moral autonomy, and, consequently, individual responsibility for morally unjustifiable things one has supported. Relativism insists on the primary importance of the cultural context in any effort to understand the formation and reproduction of a populist criminal regime, (the lack of) individual moral autonomy in such a regime, as well as the normative impact of the regime's legacies on the post-criminal condition. Following a critical reading of this argument provided by Michelle Moody-Adams, I will call this stance the inability thesis: individuals who are socialized in a perverted cultural condition, which insists that killing the targeted people is right, are deprived of the ability to distinguish between right and wrong. Having explored the inability thesis, I will shortly address two influential attempts to strengthen it with empirical evidence: Stanley Milgram's analysis of psychological foundations of obedience to authority, and Bronislaw Malinowski's understanding of the interplay between culture and politics. By the end of this section, the reader will hopefully identify the close association between the abstract conceptual argument of philosophical relativism on the one hand, and the empirical approach of cultural relativism on the other. In Section 4, I return to philosophy, to see if its analytical reasoning provides conceptual features missing from the empirical approach. Two sets of philosophical positions are explored. First, I address the philosophical version of the inability thesis: reading Richard Arneson, Michael Zimmerman, and Geoffrey Scarre reveals an original analytical argument, which aims at explaining why perpetrators of the worst crimes are not responsible. None of these authors denies the moral wrongness of crime. However, having introduced the claim of authenticity as a specific feature of the inability thesis, they argue against accountability of the perpetrators. Although the class of perpetrators is not the direct subject of scrutiny in this book, this reasoning remains relevant because it clearly exculpates all persons who are in different ways involved in crime. I will try to demonstrate that a poorly founded understanding of culture lies at the core of this abstract argument. In Section 5, I analyze Gilbert Harman's analytical effort to conceptualize the reach of moral discourse. Without resorting to cultural determinism, Harman claims that moral judgments are *logically* possible only within a particular societal context. However, in the next step, he argues that mass crime is a type of the contextually specific relationship to which moral judgments do not apply anymore.

2 Moral Relativism as a Philosophical Argument

When we define our interests and goals, or when we act, we are rarely motivated only by instrumentally rational considerations. The context of our lives is more complex. To begin with, we are moral persons. In a minimum sense, our moral personhood identifies us as autonomous agents who have the ability to judge right from wrong, and who are duty-bound to choose what is right. It follows that many of our reflections and actions are inseparable from the questions of the good life: How should I live? How should I think about questions that confront me? What should I believe? What should I do and how should I act? How should I treat other people?

These are the questions of practical morality. Answers to them function as necessary points of orientation in our lives. But, at the same time, these questions are so difficult that no one can be expected to search for answers on his or her own. Thus, we have a puzzle: on the one hand, as autonomous persons who live with our moral equals, we ought to reflect on the context of our choice, and to base our behavior on the morally right choice; on the other hand, this duty, taken in its simple form, is beyond individual abilities. No single individual can be the judge of right and wrong. So, we need guidelines to help us in our search for the answers. Let us call such guidelines moral standards, and let us understand them as norms, or stabilized directions we use to distinguish between right and wrong, good and bad, or true and false. Introducing this category leads to additional questions. How do moral standards emerge, or what is their source? Why do people typically respect them, or what makes them authoritative? How do we know that moral standards themselves are right, or how are they justified as valid points of orientation for our behavior?

Some answers are perhaps already in place. We know that every society has its normative standards, developed in the intergenerational practice of living together. This seems to offer the solution to the puzzles about the source and the authority of moral norms: we are motivated to respect them because they are specifically *ours*. In this view, categories of the right, good, and true, would be defined by the context of our historically shaped societal culture.

This is a controversial claim. On the one hand, it is difficult to dispute the importance of culture for our individual moral identities. On the other hand, the claim that a particular unrepeatable practice of living together is the only foundation of the morally relevant meanings, eliminates some important questions of justification. First, answers to moral questions are

given, and it does not make sense to ask whether these are the right answers. Second, it is pointless to discuss the morality of *anyone's* life—there can be no universal normative guidelines. The unrepeatable historical concreteness of our life cannot be subjected to any moral norm external to it. Moral knowledge about right and wrong, and the morally relevant evaluation of human behavior, are possible only relative to the historically developed, exclusive cultural standards of a concrete society. These claims provide the core of moral relativism.

Relativism is not a trivial thesis, and the strength of its arguments deserves careful reading. To repeat, my question is how relativism applies to the analysis of responsibility for collective crime. Mass killing of innocent people is deeply disturbing. Almost equally disquieting is the normalization of the criminal practice: institutionalization and routinization of the machinery of death, which are made possible thanks to the support of “ordinary people.” When one thinks about Nazi Germany or Serbia under Milosevic, the gravity of the crimes prompts some simple, but morally disturbing questions. How was it possible? What turned decent people into monsters? What happened to the elementary moral standards of right and good? How did human capacity for empathy and solidarity so suddenly disappear? One of the questions that always comes back concerns the ability of an individual to judge and to act autonomously when confronted with the evil that permeates the whole of society. A negative answer to the last question, which purports to guide answers to the former ones as well, is at the core of the relativist argument. Specifying this argument requires juxtaposing it with its opposite: the claim of moral universalism.

The question of whether the truth and justification of moral judgments are universally valid or context-specific, is one of the standard points of disagreement in moral philosophy. Consider the following statement:

At least some questions about what is good or bad for people, what is harmful or beneficial, are not in any serious sense matters of opinion. That it is a bad thing to be tortured or starved, humiliated or hurt, is not an opinion: it is a fact [...]³

This is an objectivist, or universalist statement. It argues that every mentally capable person—anytime, anywhere, and irrespective of a particular context of choice—ought to understand that harming another person is morally wrong. Indeed, it seems intuitively obvious that the claim of wrongness of

³ Mary Warnock, *Contemporary Political Philosophy* (New York: St. Martin's Press, 1970), 60; quoted after Warren Thompson, “Ethics, Evil, and the Final Solution,” in Alan Rosenberg and Gerald Myers (eds.), *Echoes from the Holocaust. Philosophical Reflections on a Dark Time* (Philadelphia: Temple University Press, 1988), 181.

harm cannot be reduced to just one among many possible moral beliefs. It seems equally obvious that this identification of moral wrong is not founded on a group's particular conventions, distinct cultural identity, or the special duties and social roles individuals may have. Neither the personal "I," nor the group-specific "we" perspectives seem proper. At stake is a moral fact—-independent of the first-person (both singular and plural) points of view—that "transcend[s] both the merely social and the merely personal."⁴ Accepting this position further implies the existence of the universally valid and context-independent standards for founding and evaluating beliefs, attitudes, intentions, and actions. We all ought to be able to recognize such standards as our own, regardless of where we belong, what we prefer, or what constraints a particular context of choice imposes on us.

Still, not everybody would agree that moral judgment is this unambiguous, not even in cases like Auschwitz, Rwanda, or Srebrenica. Sure, most of us concur that killing or otherwise harming innocent people is plainly wrong, but this in itself does not provide the argument for the universalist position. The offered intuition begs positive explanation, especially if it aims at being more than a statement of moral disgust in the face of evil. Questions are many. What is the source of the objective standpoint? What is the content of moral universals? What are the procedures of their identification? What motivates people to accept them?

Moral relativists will argue that universalism is incapable of addressing these questions, and they will offer an alternative. The relativist argument rests on two theses.⁵ The empirical thesis points out that "as a matter of empirical fact, there are deep and widespread moral disagreements across different societies, and these disagreements are much more significant than whatever agreements there may be."⁶ The metaethical thesis argues that "the truth or falsity of moral judgments, or their justification, is not absolute or universal, but is relative to the traditions, convictions, or practices of a group of persons."⁷ It is difficult to deny the intuitive plausibility of a social thesis thus formulated. In the first step, it only proposes to acknowledge the relevance of a simple proposition: our lives are not independent of historical, political, or societal circumstances. The question is

⁴ Thomas Nagel, *The Last Word* (New York: Oxford University Press, 1997), 10.

⁵ Here I follow Christopher Gowans, "Moral Relativism," *The Stanford Encyclopedia of Philosophy* (Winter 2004 Edition), Edward Zalta (ed.), available at <http://plato.stanford.edu/entries/moral-relativism/>.

⁶ *Ibid.*

⁷ *Ibid.*

then how exactly this set of empirical constraints influences our individual and collective identities, values, attitudes, choices, and actions. The relativist answer requires that we acknowledge the normative importance of belonging. Moral relativism is a normative pluralist theory, which argues that pluralism of cultures is not merely an empirical fact—it is an important feature of the normative basis of life together in Modernity. “A view from nowhere” simply does not exist. Objective reason, which claims that “something is without relativistic qualification true or false, right or wrong, good or bad,”⁸ that is, that moral judgment is a matter of the context-independent knowledge that precedes experience, is both empirically poorly related to realities in which we live, and normatively inimical to the value of moral pluralism. A Kantian who believes in arguing from the perspective of universal reason fails to see that his or her normative position makes sense only within a particular perspective.⁹ If we want to reveal the core of our most fundamental ideas, attitudes, moral beliefs and judgments, we have to turn to our culture, which provides us with the morally relevant distinctions between right and wrong.

To say that morality is always historically conditioned and group-specific, does not equal arguing that truth and justification do not exist. Moral standards are not absent—absent is a universally valid moral framework. I am not simply free to take as right what you take as wrong: I have my morality, which I (ought to) respect, but my moral truth is relative to my social and cultural context; the same holds good for you. Each of the moral standards, seen from the vantage point of a particular group, can be defended as true and right for that group, while remaining incomprehensible, or appearing as wrong, to members of all the other groups.¹⁰ One important inference is that any attempt to find a rational basis for rising above such disagreements and finding a minimum common morality, is doomed to failure. Consequently, given that there are no common

⁸ Nagel, 6.

⁹ This comes close to a classical position taken by all criticisms of the universalist position, where moral universalism is seen as a poorly hidden parochialism, which denies the wealth of cultural experiences, forcing them into the straightjacket of moral principles that are valid only for some, and often legitimizing different forms of domination: “What the relativists, so-called, want us to worry about is provincialism—the danger that our perceptions will be dulled, our intellects constricted, and our sympathies narrowed by the overlearned and overvalued acceptances of our own society.” – Clifford Geertz, “Distinguished Lecture: Anti Anti-Relativism,” *American Anthropologist*, Vol. 86, No. 2, 1984, 265.

¹⁰ James Ryan, “Moral Relativism and the Argument from Disagreement,” *Journal of Social Philosophy*, Vol. 34, No. 3, 2003, 377.

standards of evaluation, there is no room for moral conflict either.¹¹ What appears to be a moral disagreement among groups and their members is just a lack of the minimum common denominator that would make the communication among closed, self-sufficient moral positions possible.

To sum up, relativists agree with universalists that the central question concerns the positive grasp of the meaning of the morally good life. But, they insist, the answer remains relative to the social and cultural frameworks within which the individuals are placed. These frameworks differ, and they make us different people, in terms of our interests and preferences, our views of the self and society, moral convictions we hold, moral justifications of actions we undertake, and moral judgments we make.

Having informed us that morality is founded in, and justified by, our particular collective experience, relativism seems to offer neat guidelines for dealing with basic moral questions. Moral judgment has commanding authority because it stems from, and comprises an intrinsic feature of our shared way of life. Being discovered and accepted as *our* moral judgment, it becomes the true source of motivation, and the effective guideline for thinking and acting morally.

But relativism is not free of ambiguities. Most importantly, it fails to provide a clear account on the justification of moral judgments. It often reduces moral beliefs to the prevailing points of view, grounded in habits, shared cultural practices, and personal choice derived from there.¹² On closer examination, this strategy may be too fast in its cutting understanding short, and putting in its place the ready-made convictions and conventions justified by a recourse to tradition and majority support.¹³ This simple relativism argues that in our search of justification there is always a point at which we stop, concede to the primary fact of our social condition, and stick to the existing rules, beliefs and attitudes:

Since all justifications come to an end with what the people who accept them find acceptable and not in need of further justification, no conclusion, it is thought, can claim validity beyond the community whose acceptance validates it.¹⁴

¹¹ "The aim of relativism is to explain away each conflict, and this involves two tasks. It has to say why there is no conflict, and also why it looked as if there were one." – Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, Mass.: Cambridge University Press, 1985), 156–157.

¹² Gilbert Meilander, "The (Very) Last Word," *First Things*, 94, June/July, 1999, 45.

¹³ This argument faces some difficulties at the level of the logical consistency: if everything is relative, then this ultimate thesis of relativism has itself to be seen as an objective standard, and not merely as an expression of a local point of view. See Nagel, 15.

¹⁴ Nagel, 4–5.

Some relativists realize the gravity of this objection. Also, some of them are aware of the potentially frightening implications of the arguments of “relativity of truth(s)” and “disappearance of moral conflict.” Assume that I, a citizen of New Zealand, insist that Auschwitz or Srebrenica are objectively wrong, morally indefensible practices, and that they are such regardless of what some Germans or some Serbs think about them. Confronted with such a claim, a relativist cannot simply maintain that all truths are relative to the given contexts, and that one’s contextually shaped moral position—including the positions of killers, collaborators, and bystanders—cannot be judged from the perspective of any other moral position. A consistent application of thus understood relativism would lead to the conclusion that only Germans can say that the Holocaust was wrong (or that it was *not* wrong), or that only Serbs can say the same about Srebrenica. This would be an irresponsibly wrong statement, regardless of where we belong, or which theory we subscribe to. Therefore, relativism has to defend its argumentation in a manner that would effectively reject the objection of its inability to confront moral questions arising from the practices which most people, irrespective of their belonging, condemn as morally unacceptable. One way of doing this seems to be through concentrating on the specific character of culture in the context of the criminal regime.

3 Blaming Culture for Moral Confusion?

3.1 COLLECTIVE CRIME AS A NORMATIVE PRACTICE

It is difficult to deny the intuitive plausibility of moral relativism. In the first step, it only proposes to acknowledge the relevance of a simple proposition: our lives are not independent of historical, political, or societal circumstances. It is a non-controversial claim as far as institutional arrangements, or our choices of action are concerned. None of us lives in isolation from others, nor are we free of the impact of historical, social, or cultural conditions and circumstances. A more difficult question asks whether and how these features of the shared experience contribute to our individual and collective identities, values, beliefs, and attitudes. The relativists insist on acknowledging the normative importance of the empirical context, which translates the empirical thesis into a thesis of the conceptual primacy of cultural knowledge:

If even our most fundamental concepts and forms of understanding follow the vicissitudes of experience, then only by attending to why we have inherited the patterns of belief and experience we have, can we see clearly how are we to go on from here. We

need, that is, a conception of philosophy that recognizes the historically conditioned character both of the problems it confronts and of the knowledge it can acquire.¹⁵

Our moral knowledge develops within a given historical framework, as a matter of our and only our intergenerational cultural experience, and it cannot transgress the borders of that framework. The culture of a society is the provider of the morally relevant distinctions between right and wrong. More sophisticated relativists will not simply deny individual autonomy. The question “Who am I?” remains relevant, but one’s autonomy consists chiefly in the ability and duty to identify and accept normative features of the group-specific empirical context in which one lives. This duty is not an abstract requirement imposed on us from the outside: it is made possible and shaped by the situated givens of the lives we already lead. Individual identity is a cultural category: we are contextually determined autonomous beings. We can understand and evaluate the world, form our intentions, and act, only from the perspective of our culture. Two fundamental human autonomous abilities—ability to judge and ability to act—are culturally determined categories.

How does this thesis work in the case of collective crime? When thinking about perpetrators, collaborators or bystanders, we try to understand what made it possible for them to commit or accept crimes. Specifically, we want to know what led them to abandon moral standards for the sake of the perverted ethics imposed by the criminal regime. In this context, what does the thesis of the culturally conditioned abilities to act and to judge imply? While in normal situations the two qualities are not separable, their relationship becomes of critical importance in populist criminal regimes.

First, one should not reject nor underestimate the impact of the circumstances on the ability to act freely. The conditions in these regimes are sometimes so difficult that they can lead to the types of situations that provide excuses for morally wrong (non-)actions. Perhaps most of the people living in a criminal regime are most of the time powerless to prevent crime or to help victims. Perhaps their non-action or wrong action, on the one hand, and particular crimes, on the other hand, are causally linked, but such individuals can nevertheless sometimes invoke duress as the justified excuse for their behavior. They may be effectively denied freedom of choice of action, saddled with a situation they cannot control, may fail to act out of reasonable fear, or may choose to perform a morally wrong action for the sake of preventing what they see as the direct threat to them or to the people

¹⁵ Charles Larmore, *Morals of Modernity* (Cambridge: Cambridge University Press, 1996), 9–10.

close to them, even though they know that in this way they could cause harm to some other innocent people. In short, the context may perhaps excuse attitudes and actions that in normal situations would be considered morally flawed. This is so because the power of the context can be so overwhelming that it deprives the ability of an individual to control his or her actions and its consequences, or it can put the individual in a situation in which his or her ability to choose, although formally preserved, is reduced to choices which all practically deny one's autonomy. These forms of denial of individual autonomy are not culturally shaped, and I leave them aside.¹⁶

But the comprehension of the power of the context over the ability to act autonomously does not suffice for a conceptualization of the person's moral status. The main question leads beyond one's freedom to choose the right course of action, and one's possible justifiable excuses for wrong (non-)actions: can there be a reason, or a set of reasons capable of affecting one's ability to comprehend the moral character of the criminal action and its consequences? Can a person be held justifiably ignorant of the immorality of a crime, on account of his or her ignorance of the moral code? This is the question about the ability to judge in the extreme context of a criminal regime.

An analysis can depart from the noncontroversial claim that our knowledge about institutions, events, processes, or relationships is never only a matter of empirical and analytical comprehension. This knowledge is also a matter of interpretation. On the one hand, we engage our reasoning ability to understand people who surround us, the facts about the world, and the events taking place; on the other hand, we engage our attitudes, beliefs, and emotions to evaluate people, things, and processes. History knows of situations in which most of the people in a society agreed with criminal attitudes, intentions and practices committed in their name. Such positive evaluation of wrongs was based on the view that such practices were morally justified. Obviously, this supportive attitude cannot be defended as morally right. Something else is the subject of controversy. To repeat, can a person, or a group of persons, be absolved of responsibility by pointing to the interpretation of culture that was dominant during the crime, and that presented killing as a legitimate practice?

¹⁶ For a systematic analysis of circumstances that absolve persons from moral responsibility for their intentions and actions, see: Aristotle, *The Nicomachean Ethics* (Cambridge: Cambridge University Press, 2000), 40; J. L. Austin, "The Plea for Excuses," in Austin, *Philosophical Papers* (New York: Oxford University Press, 1979), 175; R. Jay Wallace, *Responsibility and the Moral Sentiments* (Cambridge, Mass.: Harvard University Press, 1994), 118.

In Chapter One I argued that one of the core features of collective crime is majority support. It follows the causal agents' ascription of the criminal purpose, intention and action to all group members—perpetrators, collaborators and bystanders act not in their own name only, but in the name of the whole group. Those who join in accomplishing the criminal purpose, formulate and spread the criminal intention and engage in criminal acts will justify each of their steps by invoking the identity of the whole group and some alleged good of each of its members. Call the latter the ethics of evil: no collective crime has ever been committed without strong ethical justification. The regimes of Nazi Germany and of nationalist Serbia under Milosevic heavily relied on a certain concept of the good, the alleged embodiment of which was the chosen group (Arians, Serbs). The ruling elite based its (auto-)legitimation on the self-assumed role of the “sovereign representative” of both the group and the binding ultimate moral truth. The necessary feature of such an ethical attitude is the re-presentation of the targeted group in the same perverted ethical terms, as the embodiment of everything that is morally wrong. The circle is closed by inferring that the destruction of the enemy group is both necessary and good. Mass killing and other types of denial of basic human rights follow. Systematic criminal action against innocent human beings is justified by the claim that they are not simply inherently “less worthy”—they represent a threat to “our good.” Consequently, killing is ethical.¹⁷ The fact that at work is a perverted “ethics of evil” does not deprive this justification of importance—without its acceptance by the majority, collective crime would not be possible at all.

Looking from the outside, and applying the universalist moral position, we could infer that such an establishment and realization of the perverted ethics amounts to a moral breakdown, in which a community and most of its members abandon basic civilizational standards for the sake of brutal

¹⁷ “Most of you will know what it means when 100 bodies lie together, when there are 500, and when there are 1000. And to have seen this through, and—with the exception of human weaknesses—to have remained decent, has made us hard and is a page of glory never mentioned and never to be mentioned [...] We have the moral right, we had the duty to our people to do it, to kill this people who wanted to kill us [...] Altogether we can say: We have carried out this most difficult task for the love of our people. And we have taken on no defect within us, in our soul, or in our character.” – H. Himmler, speech at Poznan, October 4, 1943, available at <http://www.holocaust-history.org/himmler-poznan/>. For a detailed account of Himmler's efforts to justify the extermination of the Jews to the SS troops and the regular police units under their command, see Richard Breitman, “Himmler and the “Terrible Secret” Among the Executioners,” *Journal of Contemporary History*, Vol. 26, No. 3–4, 1991, 442.

barbarianism. We will see: a lost sense of justice and the absence of elementary concern for the humanity of the members of the group targeted; indifference of the majority towards the suffering of innocent human beings; the institutionalized machinery of violence, and “ordinary men” preaching their loyalty to it. We will identify causal links between political, societal and individual perspectives. We will conclude that the ruling political and cultural elite somehow brought most of the group members into a state, in which they were ready to back the crime as legitimate practice. A majority of the subjects accepted the institutionalized lie.¹⁸ The most drastic violations of human rights were made possible through broad endorsement of a perverted value system, and through the complicity, collaboration, or “passive support” of many, ranging from those at the top of power to “ordinary men.”¹⁹ One question is: how was this possible? Can we reconstruct a process in which ordinary, recently decent people came to endorse an obviously perverted value system? Can this endorsement be explained by referring to the reign of the extraordinary circumstances produced by the regime? This question requires a reconstruction of the interplay between the society, the criminal regime, and its subjects from an internal perspective. Is this interplay shaped by the cultural context? This is where the second consideration—that of the status of autonomous judgment under the criminal regime—needs to be introduced.

3.2 INABILITY THESIS

To repeat, the standard reading of the social thesis is perhaps not controversial, because it merely informs us that the cultural context has some, non-negligent bearing on the way we act, understand and evaluate the world. Rules, featured by societal culture, outline the preferred, allowed, and appropriate way of doing and appraising things, events, processes, and human relationships. In each particular societal context these patterns tell the individuals what is expected of them, and they certainly play an important role in shaping our individual identities. Expectations they formulate, distinctions they draw between what is expected to be done and what is expected not to be done, or, in more stringent versions, what is allowed and what is forbidden, go beyond balancing the multitude of self-interests: they inform us of the societally accepted distinction between

¹⁸ Ruti Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), 81.

¹⁹ David Dyzenhaus, “Justifying the Truth and Reconciliation Commission,” *Journal of Political Philosophy*, Vol. 8, No. 4, 2000, 473.

good and bad, right and wrong, or just and unjust. In “normal times” such a process of socialization (“enculturation”) does not necessarily cause difficulties, mostly because of the presumed harmony between its universally moral and group-specific ethical aspects. I will return to the question of differentiation between these two levels of morality in the coming chapters, but for now it suffices to observe that there can be times and contexts that are not “normal” in a basic sense that becomes identifiable at a certain point by the conflict between group-specific and universal standards. Under a populist criminal regime, individuals are not merely required to remain loyal subjects while mass killing takes place. Much more is required. Subjects should demonstrate a specific moral loyalty: they should make explicit the conviction that whatever the regime does, and whatever is demanded from them, is politically justifiable and morally right. If they indeed bow to this requirement, the difficult questions of how to understand and evaluate their stance arise. To become a supportive bystander of such crimes, a mentally and emotionally normal person has to substantially change his or her view of the world. Can an analysis of the power of culture help us to understand this consent? Specifically, can supporters of cultural relativism demonstrate that consenting to crime resulted from the domination of a perverted cultural pattern? Empirically known situations prompting these questions are well-known. Let us take a look into the most important ones.

First, many bystanders who supported the regime will keep insisting after the change that atrocities for which their group is blamed have actually never happened. This is a case of literal denial, understood broadly as “assertions that something did not happen, does not exist, [or] is not true...”²⁰ Here, the relativist argument looks intuitively plausible. Since the crime-justifying ideology and criminal practices were institutionalized, often public, and happening on a large scale, it can be assumed that most claims of ignorance are factually wrong. Still, they cannot simply be dismissed as blatant lies. Why would so many people deny something obvious? The relativist answer is straightforward: because for people in such condition things are not obvious; while they may know the facts, they do not realize their moral wrongness.

Second, some people, who do not deny that mass killing happened, still argue that this was not a mass crime; for instance, they would prefer to see it as a legitimate defense of national interests. This is an instance of

²⁰ S. Cohen, *States of Denial. Knowing about Atrocities and Suffering* (Oxford: Polity Press, 2001), 3.

the strategy of interpretative denial, where “the raw facts (something happened) are not being denied. Rather, they are given a different meaning from what seems apparent to others.”²¹ Encountered in Germany and Serbia, this is yet another strange claim, given the plain fact that in the Holocaust, or in the Bosnian War 1991–1995, a vast number of innocent civilians were killed on account of their ethnic belonging. Again, if we are not content to conclude that everyone who makes such a claim is a monster, we may look for an answer in the processes of enculturation.

Third, many bystanders will argue that they did not know what was going on. The truth is denied—now, as a claim of past ignorance of facts—in a situation that apparently does not leave room for such an action:

[The claim] “we knew nothing about it” [...] refers to Auschwitz, and to everything this name symbolizes and embodies, i.e. to the serial, mass killing of one people between 1941 and 1945. But the criminal character of National Socialism had not begun with its machinery of annihilation. It began with the measures that had nullified democratic liberties, and it proceeded with arrest, torture and killing of yesterday’s political opponents, with the establishment of concentration camps, burning the books, the boycott of Jewish businesses already in April 1933, with all those events that had been known to everyone in Germany [...] Everyone knew about the proclamation of the Nuremberg Laws, about the animal brutality with which Hitler liquidated his rival Ernst Röhm and his followers, about the so-called Crystal Night in November 1933, when until then the worst pogrom against the Jews in Reich had taken place. And everyone knew about deportations of the Jews from 1940–41, which had been taking place under the free sky, in the middle of the day, and everywhere in Germany.²²

Fourth, the claim of the reign of “moral confusion” under the old regime is sometimes accepted by transitional regimes as an argument that justifies imposing limits on dealing with the past. Such limits often include amnesty or lenient treatment of perpetrators and collaborators. Jon Elster offers examples:

In defending the Italian amnesty law of June 22, 1946, the Communist minister of Justice, Togliatti, argued that [...] “it became very difficult, above all for the younger generation, to distinguish between right and wrong.” In the trial of the Auschwitz guards, the court cited as a mitigating circumstance that National Socialism had created “an unexampled spiritual confusion [...] bring[ing] into question previous values and [erasing] the boundaries between right and wrong.” Concerning the trials of the GDR border guards, it was similarly argued that “given the indoctrination of the soldiers, their socialist upbringing since childhood and the approval of the use of firearms

²¹ *Ibid.*, 7.

²² Ralph Giordano, *Die zweite Schuld. Von der Last Deutscher zu sein* (Cologne: Kiepenheuer & Witsch, 2000), 38.

in the GDR, it was impossible to claim that their obedience of orders was obviously contrary to the law.”²³

These different forms of denial are unconvincing in terms of their truth-value; they cannot stand the test of moral judgment either. Still, determining that a certain attitude or behavior does not meet the truth criterion, and that it is not morally defensible, falls short of explaining why such an attitude is accepted, or why such a behavior takes place.

Cultural relativism aims at providing an explanation, in the form of a radical version of the context-of-culture argument, which Michelle Moody-Adams labels the inability thesis.²⁴ The claim is that the interplay between culture and agency in the criminal societal and political context assumes a distinct form. In a nutshell, the very existence of one's moral capacity to recognize the character of crime is decisively shaped by one's cultural environment. An individual brought up in a collectivist culture that affirms the killing of members of another group as a good practice, remains deprived of a social context in which he or she could master the distinction between right and wrong. History provides examples of cultural and political contexts in which the ethics of evil was effectively implemented in the processes of socialization, through different measures ranging from education and cultural propaganda to political manipulation, generating the inability to think, judge and act morally. In such societies the overall political, social and cultural condition rested on the ideologically promoted, officially sanctioned, and successfully carried out falsification of the basic moral standards. Once the enterprise of socialization succeeds, subjects—both perpetrators and ordinary people—cease to be capable of understanding the wrongness of their attitudes and actions, because they have interiorized ethical patterns that justify criminal ideology and practices. The group as a whole and each of its members are victims of moral confusion.

The inability thesis argues that the interplay between culture and agency in the criminal societal and political context assumes a distinct form. Here we need to recall that a criminal regime in its relationship with subjects engages in two principal, mutually related tasks. The ideological production of a set of ethical references that deliberately confuse the relationship between the group ethics and universal morality is followed by

²³ Jon Elster, *Closing the Books. Transitional Justice in the Historical Perspective* (Cambridge: Cambridge University Press, 2004), 160.

²⁴ Michelle Moody-Adams, “Culture, Responsibility, and Affected Ignorance,” *Ethics*, Vol. 104, No. 2, 1994, 293.

implementation of different techniques aimed at interiorization of the new ethics by the subjects. Taken together, these two strategies result in the reign of moral confusion. What does moral confusion consist in? The inability thesis argues that “[...] one’s upbringing in a culture simply renders one unable to know that certain actions are wrong.”²⁵ However, from the presentation offered above it follows that the thesis actually consists of two elements: the inability to judge and the inability to act morally, both resting on the claim of ignorance.²⁶ The thesis asserts that if individuals are brought up in a collectivist culture that supports crime as right and good, they remain deprived of the social context that would teach them proper moral distinctions. Saddled by moral ignorance, such a person lacks the capacity to make sense of his or her place in the world, both at the level of judgment and action. This can be summarized as the claim that moral flaw at a societal level creates individuals whose patterns of evaluation and action indeed appear as morally flawed, but only from the perspective of civilized normalcy, in which moral laws are valid. The matter with this however, is that individuals imprisoned in the described cultural contexts are, strictly speaking, beyond moral judgment, simply because they are brought up in a society which has discarded universal moral standards and installed evil in their place. Hence, when supporters of the thesis make the claim that subjects of a criminal regime *are not able* to make moral judgment (inability to judge), and to act accordingly (inability to act), they actually argue that subjects *do not know* the difference between right and wrong (the claim of culturally induced ignorance). And, ultimately, they cannot tell the difference, because in their society it does not exist.

In short, the inability thesis identifies culturally induced and socially widespread *moral ignorance*, which in turn impairs the ability of human beings to think and act as responsible agents, and which ultimately—at the level of the *ex-post facto* evaluative judgment—justifies the claim of diminished legal, political or moral accountability:

A graduate of Sandhurst or West Point who does not understand his duty to noncombatants as human beings is certainly culpable of his ignorance; an officer bred up from childhood in the Hitler *Jugend* might not be.²⁷

²⁵ Moody-Adams, “Culture...,” 293.

²⁶ *Ibid.*

²⁷ Alan Donagan, *The Theory of Morality* (Chicago: Chicago University Press, 1977), 135; quoted after: Moody-Adams, 1994: 293.

Of course, the ways perpetrators and regime supporters are involved in crime differ. While perpetrators contributed to wrongdoing and its consequences in a directly observable causal manner, the causal relationship between “ordinary people” and crime is much more difficult to establish. Still, the argument of the inability thesis applies equally to both groups. In case of perpetrators, the thesis would not question the direct causal link between the action and its consequences; it would also concede that, for some of the perpetrators at least, there existed freedom of action. But, the claim remains valid: although wrongdoers were technically free to choose what to do, the character of the cultural constraints deprived them of the capacity to comprehend the moral impact of their choice. When applied to bystanders, the thesis would follow the logic of defense of perpetrators, but the task would be much easier: since no direct causal link between (non)action and crime appears as a problem here, the task is “merely” to demonstrate that the context of culture deprived them of the autonomous ability to judge the actions others committed in their name. Hence, bystanders should not be blamed for their attitudes of support for the regime.

However, the so established direct, natural-seeming, causal link between the cultural condition and personal autonomy is not free of difficulties. We certainly know of regimes that indulged in gross abuse of elements of culture in the effort to induce an inability to distinguish between right and wrong, and we know that in many cases such efforts led to what appeared to be a case of widespread moral ignorance of the subjects.²⁸ But the empirical fact of the moral carelessness that prevailed under the South African apartheid regime still does not convincingly demonstrate that for a normal human being, a member of the ruling white minority group, it was indeed impossible to observe that killing, torture, and humiliation of innocent human beings, who happened to belong to the black majority, were wrong. Moody-Adams notes that the inability thesis is based on a wrong interpretation of empirical knowledge, where the fact that many people *did not* act in accordance with moral standards is presented as the evidence that they *could not* act morally. But it is difficult to empirically demonstrate that an individual or collective action—say, support for the regime, or silence about crime—is really the consequence of culturally induced moral ignorance. How to prove empirically that a morally wrong action results from a culturally produced and shaped lack of moral sensibility, rather than from a fear of the consequences of a morally right ac-

²⁸ Tracy Isaacs, “Cultural Context and Moral Responsibility,” *Ethics*, Vol. 107, No. 4, 1997, 672.

tion, or even a free—interest-based or conviction-based—agreement with the goals of the regime? Such an “empirical claim” would actually need to rely on some interpretative assumptions. And indeed, in an effort to provide more reliable evidence to support their thesis, its advocates offer two such assumptions: a certain understanding of individual psychology, and a detailed analysis of the cultural context in particular regimes.²⁹

3.2.1 *Supporting inability thesis: psychology of obedience to authority*

Different versions of the psychological hypothesis point to certain properties of “human nature”—the “natural weakness” of the human character, the truth of psychological egoism, or the relevance of unconscious motives³⁰—as the decisive factors in forming attitudes to the criminal regime and its actions. Stanley Milgram famously argued that “ordinary people, simply doing their jobs, and without any particular hostility on their parts, can become agents in a terrible destructive process.”³¹ If collective crime has to do with human nature, and if most people are not monsters, the question is why normal persons participate in atrocities, support them, and see the criminal regime as legitimate. According to Milgram, the answer is provided by the social thesis, and the way it connects to human psychology. The core of the social thesis is “the power of the situation,” that is, the social, cultural and political context capable of shaping human motivations and choices of action. For any approach aiming at analytical accuracy, at stake is finding the core element of the context, and demonstrating how exactly it influences human autonomy. According to Milgram, the central determining feature of a person’s environment is political authority, as an institution that has the right to issue legitimate commands. In the view of the addressees, *any* command made by the authority is legitimate. People are psychologically conditioned in a manner that makes them open to the influence of the authority, to the extent that they would be ready to do whatever they are told to do:

A man feels responsible to the authority directing him but feels no responsibility *for* the content of the actions that the authority prescribes. Morality does not disappear, but

²⁹ Moody-Adams, “Culture...” 294.

³⁰ *Ibid.*

³¹ Stanley Milgram, *Obedience to Authority: An Experimental View* (New York: Harper & Row, 1974), 5.

acquires a radically different focus: the subordinate person feels shame or pride depending on how adequately he has performed the actions called for by authority.³²

This is the argument of obedience to authority, which Milgram presents as the inference of his laboratory experiments. The argument, and the method of arriving at it, has been very influential, provoking both support and criticism. Among other things, critics repeatedly pointed to the hastily made analogy between the Holocaust and a laboratory experiment. Milgram's findings demonstrate psychological mechanisms and the destructive force of obedience in an artificially constructed environment, which participants freely entered; this artificially created and strictly controlled authoritative relation substantially differs from the authoritative relations in a totalitarian state. Thus, accepting Milgram's experiment as relevant requires two steps, according to Blass: first, to assess the method used and the evidence gathered in the experiment; second, to demonstrate the relevance of the method and findings in a societal and political context, especially in the circumstances of a totalitarian regime.³³ Milgram concedes that "what happened in Germany from 1933 to 1945 can only be fully understood as the expression of a unique historical development that will never again be precisely replicated."³⁴ Still, it is possible to draw generalizable conclusions from a lab experiment, as long as it is constructed as a "simple situation" which emulates the legitimate authority relationship: "This situation confronted both our experimental subject and the German subject and evoked in each a set of parallel psychological adjustments."³⁵ Recall that obedience to authority does not discard, but rather reshapes morality and responsibility, making them into features of the political dynamics and the way of life. Accordingly, it is more than a source of psychologically relevant submission—obedience to authority becomes a core component of culture.

Milgram does not succeed in overcoming the objection that a laboratory experiment cannot be translated into the explanatory model of social relations. The assumed link between culturally positioned authority on the one hand, and individual psychology on the other, can hardly be empiri-

³² *Ibid.*, 1.

³³ Thomas Blass, "Perpetrator Behavior as Destructive Obedience: An Evaluation of Stanley Milgram's Perspective, the Most Influential Social-Psychological Approach to the Holocaust," in Ralph Erber and Leonard Newman (eds.), *Understanding Genocide: The Social Psychology of the Holocaust* (New York: Oxford University Press, 2002), 98.

³⁴ Milgram, 176–177.

³⁵ *Ibid.*

cally demonstrated, unless we take for granted the truth of the psychological hypothesis. However, if we do that, the “empirical analysis” would merely serve to demonstrate the already presumed “truth” about the alleged essence of human nature.³⁶ Contrary to the claim that the experiment has demonstrated this psychological essence, its generalizability remains a matter of interpretation, rather than a statistically proven empirical fact.³⁷ In short, we can argue that individuals are psychologically unable to resist the pressure of a culturally induced ethics of evil only if we assume or prove that the human self is biologically conditioned in a manner that makes one’s personality fully dependent on the whims of the cultural context.

3.2.2 Supporting inability thesis: on the political production of culture

I will now explore an attempt at a more precise elucidation of the character of the societal and cultural condition in a criminal regime, to see whether it strengthens the argument of the inability thesis. Bronislaw Malinowski tries to conceptualize the cultural essence of totalitarianism. He departs from the question about the relationship between individual freedom and culture. Freedom can be understood only as a feature of the culturally shaped human condition in society. As “a set of opportunities in which individuals and groups can mature their purposes, enact them successfully, and enjoy the fruits of their labors,”³⁸ freedom is an “attribute of action” that presupposes obeying cultural norms. To say that these rules determine the unchallengeable framework of human freedom, is nothing but the inference of the character of the co-existence of human beings in society. Following the basic need of human survival, culture emerges as an indispensable means of the life together:

This new artificial environment obeys a determinism of its own. There exist laws of cultural process, of the constitution of culture, and of the efficiency of concerted activities. Hence culture inevitably becomes a source of new constraints imposed upon man [...] all those constraints which are dictated by cultural determinism are as indispensable to successful behavior as are the laws of nature and of the organism. Free-

³⁶ Moody-Adams, “Culture...,” 297.

³⁷ Arthur G. Miller, *Social Psychology of Good and Evil* (New York: Guilford Press, 2004), 199.

³⁸ Bronislaw Malinowski, *Freedom and Civilization* (New York: Roy Publishers, 1944), 321.

dom, indeed, consists in the lead and guidance which the rules and laws of culture give man.³⁹

Only people who live in a culture supportive of freedom can be free. Freedom-supportive culture rests on “rules, norms and laws which are as inevitable for action as they are creative of freedom.”⁴⁰ Where such a context is absent, that is, where the norms of the dominant culture are not “creating freedom,” people cannot be free. This is not only the absence of external freedom from constraints, which would prevent autonomous choice and action—internal freedom, understood as the ability to judge, is also missing. The condition of unfreedom does not result principally from a regime’s use of unbounded coercion. A totalitarian culture does not rest on fear and physical repression only—rather, looking from the outside, we may be tempted to see it as being voluntarily accepted by subjects. To understand this, we need to take a step back, and observe how the regime comes to power. In the beginning, it undertakes a “cultural revolution,” in which the existing culture is destroyed and substituted by a new, quasi-religious ethics of the ultimate truth about the group-specific good.⁴¹ In the process, “totalitarianism thus destroys the substance of its own culture and transforms the nation into a blind instrument of power, a gigantic human factory of force.”⁴² New rules of behavior and new principles of valuation are explicated, with the intention to cover all spheres of human existence in society. Subjects have to be made to accept that the observation of the newly re-constituted ethics provides the necessary framework for the meaningfulness of their individual and collective existence. In addition, they have to be made to “understand” and accept that the new culture speaks exclusively through the regime and its agents, and that unconditional obedience is the only true freedom. This unquestionable knowledge about the essence of the good, originally available only to the regime, its ruling avant-garde party, and its (God-like) Leader, is presented through the instruments and practices of totalitarian imposition as the “finally found,” that is, as the eternally present, but only newly discovered, essence of the genuine culture. To achieve this goal, the regime has to engage considerable resources:

Education in such cultures inculcates above all the attitude of submission, intellectual and spiritual [...] The modern schooling and indoctrination of all totalitarian regimes is

³⁹ *Ibid.*, 34–35.

⁴⁰ *Ibid.*, 48.

⁴¹ *Ibid.*, 306–313.

⁴² *Ibid.*, 309.

the last word in an education which kills initiative and criticism, includes complete submission to dictated truth, and thus establishes the psychological background for a complete integration of the individual into an obedient human machinery, ready to accept any order or command from those above. In such cultures the main point with reference to freedom is that the individual is made to accept all his differential purposes as well as the purpose of his life and his career as dependent upon the centralized authority.⁴³

Following Malinowski, the inability thesis reads as cultural determinism. This determinism emerges as an original combination of an organicist perception of culture on the one hand, and the decisive role of political authority in the reproduction of that culture on the other. What does this mean?

First, culture is understood as an essentially independent set of norms, values, beliefs and attitudes, to which individuals and society relate as passive recipients. Culture is comprehensive: it covers all the relevant spheres of social life and it provides all relevant answers to the questions of individual lives. Culture is also self-sufficient: it is closed to the influence of other cultures.⁴⁴ It follows that culture should not, and indeed cannot, be submitted to an independent test, which would ask about the reasons and reach of its validity.⁴⁵ This claim does not imply that culture does not change at all, but it does shape the contours of culture's moral authority: culture is the ultimate authoritative source of the differentiation between the right and wrong ways of thinking and acting.⁴⁶ In other words, culture is the source and the authoritative framework of individual and collective identities, whereby individual self is just a particle of the collective, which is in turn presented as the embodiment of the unquestionable metaphysical unity. Culture is given, both as the means for life, and the way of life. Everyday experience, history, and sociology in different ways show how wrong it is to consider a person autonomous from his or her cultural context. One *is* only through one's culture. In the eyes of cultural relativists, this is not a collectivist normative thesis, but simply

⁴³ *Ibid.*, 191–192.

⁴⁴ “The argument of relativism is that values are [...] relative to each society and the search for universal moral values a logically incoherent enterprise... Cultural determinism makes sense only if we assume that culture is a cohesive and tightly structured whole that is not itself influenced by anything external to it, and that individuals are a passive and pliant material devoid of independent thought.” – Bhikhu Parekh, *Rethinking Multiculturalism. Cultural Diversity and Political Theory* (Handmills: Macmillan Books, 2000), 157.

⁴⁵ For a critical analysis of this claim, see Nenad Miscevic, *Nationalism and Beyond. Introducing Moral Debate About Values* (Budapest: CEU Press, 2001), 156.

⁴⁶ Edward Shills, *Tradition* (London: Faber & Faber, 1981), 13.

analytically sound information about the determining set of features of human life in society. This is identified as the ultimate formative importance of socialization, where socialization itself is understood as enculturation, that is, as the process in which individuals receive ready-made and binding patterns of thought and action.

Second, to say that culture is given and all-encompassing, does not imply its self-sufficiency: culture is incapable of autonomous reproduction. The process of enculturation is always mediated by political authority and “ideological state apparatuses.”⁴⁷ Malinowski distinguishes between liberal and illiberal cultures. The first is the system of social norms supportive of freedom, institutionalized and guaranteed by political authority. Thus understood, liberal democracy is distinguished by the culturally created and politically supported harmony between universal moral values and group-specific ethics. In illiberal cultures, on the other hand, the collective good presupposes denial of both universal values and individual autonomy. Living in a decent polity, we may not be interested—unless we are theoreticians of culture—to explore the relationship between individual moral autonomy, on the one hand, and the claim that our patterns of thought, evaluation and action are culturally determined, on the other. But, in border situations, when the regime consists of formal institutions and actors that support and reproduce cultural rules, values, and practices affirmative of crime, it will become painfully clear that we are critically shaped, or impaired, by an authoritative reading of culture. A person born in a political and cultural context in which different forms of exclusion of “others” are presented as legitimate requirements of the collective good, cannot know that such attitudes and practices are morally wrong.

And not only that: a person born in the culture that used to accept universal values is incapable of preserving the ability to distinguish between right and wrong once a violent change of the normative system happens. Exposed to the new regime’s “enculturation,” one’s moral autonomy will diminish to the point at which one will readily accept a revolutionary culture of evil as one’s own. In other words, saying that culture is independent from an individual, does not imply only its imposition as a result of inter-generational social processes. The power of culture becomes prominent in regime changes that violently disturb normative continuity, by creating a new system of normative expectations, which underline the validity of formal rules and legitimacy of practices we never knew as ours. With totali-

⁴⁷ For a critical analysis of this view of the relationship between political authority and culture, see Moody-Adams, *Fieldwork*... 83.

tarianism, it becomes apparent that the regime's mediating role is not constrained to a mere protection or delivery of any alleged cultural essence: what subjects receive is rather the regime's product, formulated as the binding interpretation of the true cultural meanings, coupled with the equally binding patterns of the allowed thought and action.

If this exposition of culture were accurate, that is, if the politically supported culture of a society were really capable of creating definitive patterns of reflection and action, then any talk of a universally valid distinction between right and wrong would be indeed meaningless. He or she who is born into a murderous culture could not possibly know that killing is wrong. This in turn leads to the concession to moral relativism: what takes off as cultural determinism, that is, as the view of individuals enslaved by culture, lands as the relativist "anything goes" argument, which denies the possibility of the existence of values that individuals would regard as internally valid, regardless of an abrupt authoritative effort to destroy them.

Resisting for the moment the temptation to agree or disagree with this way of thinking, it is possible to observe something confusing. On the one hand, the culture is given, enslaving group members almost as a natural force. On the other hand, political authority is said to have a vast ability of creating that same culture. To integrate these two claims into a coherent whole, it seems necessary to take a step Malinowski fails to consider, and return to the thesis about the "human nature." Perhaps some cultural relativists do not find this step attractive, but on closer inspection it seems that there is no way around making it. Only if the person is presented as a manipulable being, will we be able to understand culture as something agent-independent and, at the same time, freely manageable by political authority. Only after the introduction of the psychological thesis do the two key points of Malinowski's argument come together: first, cultural determinism is not a *perpetuum mobile*, but a social product; second, society itself is a political product. Taken together, these three elements—human nature as the culturally produced category, culture as the social product, and society as the political product—could perhaps explain a forceful change of the moral pattern, where universal standards are rejected to be replaced by the ethics of evil, where evil is presented as the "finally found" ultimate group-specific good, and where this all creates a "new man."

Is this a sound explanation of the power of culture? And what can we learn about the "new man"? How does he or she think about the world, feel about other people, shape intentions, and act? How does the "new man" relate to the results of his attitudes, intentions, and actions? Finally,

how to judge the “new man”? Can his attitudes, beliefs, and actions, stand the test of moral justification? Is it right to ask the question of justification at all? At this point it may not be out of tune to return to philosophical relativism, to see how a conceptual analysis relates to the offered empirical claims.

4 The Inability Thesis as the Authenticity Thesis: on “Broken Thermometers,” “Genuine Beliefs,” and Mass Crimes

The inability thesis implies that moral corruption at the societal level creates individuals whose patterns of evaluation and action indeed appear as morally flawed. But the moral corruption of the practice of mass crime can be observed only from the viewpoint of civilized normalcy, in which moral laws are valid. Only people who live in a society whose cultural identity is based on the harmony of universal and group-specific values can distinguish between right and wrong. One can see only what is valid in one’s society. Individuals imprisoned in the described cultural contexts remain strictly speaking beyond moral judgment, because they are brought up in a society which has effectively deprived them of the opportunity to learn moral standards.

This is the typical version of the inability thesis, according to which the perpetrators and bystanders should be absolved of accountability for crime. But some relativist authors would not stop here—they argue that even in such an extreme context, persons remain moral agents. Without denying either the power of duress to diminish the ability to act, or the power of the criminal ideology to destroy one’s ability to judge, they claim that there still exists room for the moral appraisal of one’s actions. It follows that moral guidelines we find in a criminal regime cannot be simply dismissed as morally irrelevant on the account of their unjustifiability. To judge perpetrators, accomplices, and bystanders relative to the context, first requires assessing the authenticity of their moral convictions. The second question is whether the agents acted in accordance with their authentic convictions. The conclusion reads that acting in accordance with one’s authentic beliefs exculpates.

4.1 RICHARD ARNESON ON MORAL INEQUALITY AND RESPONSIBILITY

The argument opens by stating the criterion of authenticity. An “authentic person” does what he or she *sees as right*:

Suppose I do the best I can with my limited cognitive capacities, I make a judgment as to what is morally right, however misguided, and I am conscientiously resolved to do what I take to be morally right.⁴⁸

Suppose the agent—due to the limitations of personal cognitive capacities or due to the effective social imposition of moral ignorance—erroneously infers that killing people who belong to an ethnic group is morally permissible, and he or she indeed goes on to realize this conviction by committing murder. We see the agent acting wrongly, but we also see the agent doing so because of the mistaken belief that wrong is right. How to judge the agent? In answering this question, Arneson departs from the claim that “doing what one thinks is right is noble and admirable even if one’s conscience is a broken thermometer.”⁴⁹ It is so because “the capacity to do what is right can be factored into two components, the ability to decide what is right and the ability to dispose oneself to do what one thinks is right. One might hold that the latter capacity is the true locus of human dignity and worth.”⁵⁰

So, the abilities to judge and to act are not of equal moral weight. Moral evaluation of the agent should be based only on the latter. People are not moral equals, meaning that their abilities to distinguish right from wrong differ—this is why we cannot take the ability to judge as the commonly acceptable baseline for the assessment of one’s morality. But all people are capable of deciding whether to follow their convictions or not. Hence, one’s authenticity—doing what one *sees as right*—is the fair basis of moral evaluation. Following his critique of “Kant’s epistemology and psychology,” Arneson offers a scale of moral capacities, and uses it to distinguish “not persons,” “near-persons,” “marginal persons,” and “genuine persons.”⁵¹ The agents can be for different reasons effectively locked in a state of moral confusion, but their resulting moral ignorance does not imply that they do not think about moral questions at all. They do make

⁴⁸ Richard Arneson, “What, If Anything, Renders All Humans Morally Equal?” in Dale Jamieson (ed.), *Peter Singer and His Critics* (Oxford: Blackwell Publishers, 1999), 120–121.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

their moral choice, albeit the erroneous one. The choice remains relevant at the level of action: like any other people, these persons can act in accordance with, or against the demands of their moral conscience. Given that the inability thesis holds, they cannot be blameworthy for the morally wrong choice; neither can their action be assessed against the objective moral standard of right. The only remaining criterion of morality is one's genuine commitment to one's moral choice. In the above quotation, the agent's moral reflection is fatally flawed, but the resulting conviction and intention are genuine, and the action is true to them. The agent acts true to his or her conscience (that is, if the agent kills because he or she genuinely believes that killing is right), and therefore the action should be judged as "noble and admirable."

Think of Hitler along Arneson's lines. When Hitler reflects on German history and the present condition, when he deduces that Jews are at fault for what he sees as the plight of Germans, and that therefore they deserve to be killed, he is committing a terrible moral error. Perhaps his capacity to distinguish rationally between right and wrong is very limited—perhaps he only marginally qualifies for personhood. But realizing that he is only a "near-person" is not a reason to excuse him of the responsibility for his actions. He does not need an excuse at all: when he inspires and leads the Holocaust, he is acting "admirably," because his action is true to his reflection, regardless of how distorted that reflection is. In acting on reflection, he has demonstrated the "valued capacity" to act conscientiously, and this is why he would have to be exempted from negative moral judgment and from retrospective responsibility for what he did. Again, Hitler should not be treated as a person who does not qualify for assumptive responsibility in the first place. He *is* assumptively responsible, but the criterion of his responsibility has to be adjusted relative to who he really is. Nothing here is meant to diminish the horrifying character of Nazism and the Holocaust. But, once we realize that the Kantian principle of moral equality, and the ensuing claim of the equal ability to judge are empirically wrong, we realize that no objective moral principles can be used as the benchmarks of one's responsibility.

4.2 MICHAEL ZIMMERMAN AND THE DEBATE ON "EXCUSING THE INEXCUSABLE"

The authenticity thesis provides what some moral philosophers see as a worthy guideline. First, killing innocent people is "beyond the pale" if it can be shown that the murderer sincerely believed that his or her action

had been right. Second, one who kills motivated by a genuine conviction is more worthy of our moral empathy than a selfish or frightened bystander who turns his or her head in order not to see:

Yet it is one thing to act from passionate commitment to bad ideals that one believes to be good, and another to be a moral fellow traveler who from laziness or an eye on the main chance is content to think within the moral frame favored by his superiors or peers. Both kinds of agents could be said to act in accordance with their moral beliefs when they do evil, but there is nothing noble or admirable about people who are complicit out of selfish disregard or indolence.⁵²

Imagine a Serbian who, led by sadistic, greedy, or opportunistic motives, joins the paramilitary forces and participates in mass atrocities against the ethnic Albanian population. This agent fails to consider the truth of the distinction between right and wrong as relevant for his or her choice of action; he or she will be responsible for a failure to believe the truth. Second, imagine another Serbian who joins the same unit and participates in the same mass killing, guided by—frighteningly erroneous, but genuine—belief that killing is right. This agent wrongly believes in the truth of facts. Surely, the sincerity of belief does not justify the action, but it suffices to absolve the agent from responsibility.

Focusing only on the sincerity of the murderous intention, and disregarding the question of the moral character of that intention, the authenticity thesis abandons the independent relevance of the insight that the crime presents the cruelest violation of basic moral standards: the immorality of crime does not translate into blameworthiness of criminals. The supporters of this position understand that it hurts our moral intuitions, and in response they try to prove its analytical validity. How does the defense work? Michael Zimmerman offers perhaps the most intriguing version of the authenticity thesis:

When Auschwitz camp commandant Rudolf Höss had over two million people put to death, he was not to blame. When Adolf Eichmann delivered victim after victim to the concentration camps, he was not to blame. When William Calley led the massacre of hundreds of civilians at My Lai, he was not to blame.

These are startling claims. Many find them outrageous. I think that they are probably true.⁵³

⁵² Geoffrey Scarre, "Excusing the Inexcusable? Moral Responsibility and Ideologically Motivated Wrongdoing," *Journal of Social Philosophy*, Vol. 32, No. 4, 2001, 458.

⁵³ Michael Zimmerman, "Controlling Ignorance: A Bitter Truth," *Journal of Social Philosophy*, Vol. 33, No. 3, 2002, 483.

Indeed, this is an assertion that most people will feel uneasy with. At stake is a radical attempt to offer philosophical arguments in support of determinism of the inability thesis. The core of the argument provides the already mentioned claim of justified moral ignorance. Let us recall that determinism typically (Arneson being an important exception) aims at proving that the power of the social and cultural context in a criminal regime excludes the perpetrators from the community of assumptively moral persons—in this sense, they do not differ from children or mentally ill. For this reason, argues Zimmerman, the claim that Höss, Eichmann, or Calley are not responsible remains true, even if it is a “bitter pill to swallow.” Although their freedom of choice is not denied by the external circumstances, killers, collaborators and bystanders lack the ability to judge. Thus, even when they inflict the cruelest harm on innocent people, we cannot blame them, simply because they remain beyond the reach of an independent moral judgment. Shortly, the claim is not that the crime can be justified, but rather that the circumstances effectively exclude its agents from the moral community, rendering immaterial the question of their retrospective responsibility.

What is novel in this argument in comparison to the “classical” moral relativism and cultural determinism, which also argue that criminals “could not know,” and that therefore they are not responsible for the failure to apprehend the moral corruption of their behavior? Zimmerman’s starting point is that we need to revisit the question about the conditions under which somebody can be responsible for ignorance about something. The reasons on the basis of which we can blame agents for ignorance of the moral implications of their actions are much more restrictive than it is routinely assumed. At stake is factual ignorance, which Zimmermann understands as “the failure to know the truth,” which in turn can be grasped only as “a failure justifiably to believe the truth.”⁵⁴ This failure can appear in two forms. The first is negative, where I do not believe the truth of something. The second is positive: I believe the truth, but my belief is unjustifiable. Surely, the latter case also implies the negative claim, but only as an inference of the positive conviction: I fail to believe that killing is bad *because* I genuinely believe that killing is good. In the first case I simply fail to address the moral relevance of this question. The first case qualifies as the blameworthy ignorance; the second does not.⁵⁵

⁵⁴ Michael Zimmerman, “Moral Responsibility and Ignorance,” *Ethics*, Vol. 107, No. 3, 1997, 412.

⁵⁵ *Ibid.*

A straightforward objection argues that a mistaken view of the moral facts cannot provide the ground for the judgment of innocence. Höss perhaps indeed failed to realize the moral meaning of his actions, but he ought to have known. The claim that there can be contexts depriving individuals of the ability to make the basic distinction between right and wrong cannot be defended. In his critique of Zimmerman, James Montmarquet rejects as rhetorical the argument that the person who is not aware of the wrongness of his or her position cannot be expected to try to overcome it. The argument wrongly assumes that such people are mere products of a difficult context. It fails to see that they actually brought themselves into this condition, through the unacceptable carelessness towards the world in which they live, and the people with whom they live:

If one is in a given mental state but is not aware of any wrongness attached to being in this state, how can one be expected to exert any efforts to get out of this state? (This seems to violate the familiar notion that “ought implies can.”) The answer to this rhetorical question, however, is that if one’s lack of awareness of any wrongness is *itself* culpable—that is, if due to such factors as not bothering to ask oneself whether this is a wrongful state to be in—then one certainly can, and should, be “expected” to be in some different state. To be sure, we are not expecting this individual, magically, to exert a suitable effort while being in the mental state he is; rather, our expectation is that he should not be in this state.⁵⁶

What is Zimmerman’s response? The critique assumes that the “lack of awareness of any wrongness” leads necessarily to culpability. This is wrong. The agent who today sticks to the wrong belief is not in control of his or her today’s carelessness: “[...] One cannot have direct control over the care one takes regarding what to believe about something or over the belief itself...”⁵⁷ Zimmerman then agrees with Montmarquet that the analysis of responsibility requires stepping back in time, and focusing on the moment of transition from one state of mind (say, where the agent believes that killing is wrong) to another state of mind (where the agent believes that killing is right). But, Montmarquet mistakenly believes that one is always directly responsible for entering a certain state of mind—Zimmerman argues that a careful look into one’s past shows that no one can be directly responsible for changing one’s moral views. If this is so—if a mass murderer is not directly culpable for becoming morally corrupt—then he or she cannot be directly culpable for killing.

⁵⁶ James Montmarquet, “Zimmerman on Culpable Ignorance,” *Ethics*, Vol. 109, No. 4, 1999, 845.

⁵⁷ Zimmerman, “Controlling...,” 485.

Zimmerman travels long before reaching this conclusion. Consider first the hypothesis about the minimum necessary condition of causal responsibility: "One is culpable for behaving ignorantly only if one is culpable for being ignorant."⁵⁸ Hence, to blame the agent who genuinely believes in the rightness of his or her wrong action, we have to show his or her direct responsibility for a preceding action. Direct responsibility for that preceding action would mean that one acted knowing: (1) that the action was wrong; and (2) that it would produce one's later ignorance.

If [...] one is culpable for ignorant behavior, then one is culpable for the ignorance to which this behavior may be traced. Hence one's culpability for one's ignorant behavior, at least, is merely indirect... Indirect culpability for something presupposes direct culpability for something else. Whatever this something else is, it cannot be ignorant behavior, because then the argument would apply all over again to this behavior. Hence all culpability can be traced to culpability that involves lack of ignorance, that is, that involves a belief on the agent's part that he or she is doing something morally wrong.⁵⁹

Shortly, one who kills following wrong moral beliefs would only be responsible provided one did something in the past with the intention of bringing oneself into a state of later moral ignorance.⁶⁰ Then the central question, claims Zimmerman, is "how can I control [...] my transition from a state of not believing that *p* to a state of believing that *p*? Such control requires that the transition occur either by way of my bringing it about that I believe that *p* or by way of letting it happen that I believe in *p*."⁶¹ Montmarquet will argue that in this situation everyone has a fundamental duty of reflection: each person, confronted with the possibility of the transition ought to care, that is, ought to demonstrate the openness to the questions of truth and value.⁶² Zimmerman disagrees:

But even if taking such care were in my direct control, *still* we should say that my believing that *p* is not in my direct control. This is because, in such a case, my bringing it about that I believe that *p* must be a nonbasic action [...]⁶³

So, moving from the state of not believing that *p* (say, I do not believe killing innocents can ever be justified) to the state of believing that *p* (where I would believe killing innocents is justified) is a nonbasic action.

⁵⁸ Zimmerman, "Moral...", 414.

⁵⁹ *Ibid.*, 418.

⁶⁰ *Ibid.*, 415–418.

⁶¹ Zimmerman, "Controlling...", 487.

⁶² Montmarquet, 845.

⁶³ Zimmerman, "Controlling...", 488.

It is nonbasic because the talk is about people who are “closed-minded” at the moment of transition. For such people, it holds that “I must first change my attitude from one of being “closed” to one of being “open” and it is only *by way of* doing this that I can come to see the truth.”⁶⁴ It is because of the closed-mindedness at the moment of transition that those who will later become killers fail to ask Montmarquet’s question: the basic action of taking morally proper care would require opening one’s mind.⁶⁵ If I understand Zimmerman well, the argument can be presented through the following example: before transition, Eichmann most likely had not believed that killing innocent people was right. But he was closed-minded (for instance, he believed that the Jews were exploiting the Germans). When the time of the transition came, he failed to perform the basic action of opening his mind (which would mean realizing that his views on the Jews are actually unjustifiable prejudices), which resulted in his nonbasic action of accepting the belief that *p* (killing the Jews is justified).

Analytical and empirical conclusions follow. Analytically, one’s responsibility for an action committed in ignorance of moral norms is “at least indirect.” Even if we establish that the closed-minded agent in the past successfully carried out the action intended to cause their own later ignorance, we need to take into account two moments: first, this is a non-basic action; second, the agent is at the moment of committing the blameworthy action ignorant not only about the character of today’s action, but also about the character of the past action that brought about the transition. Thus, “one is never in direct control of whether one is ignorant.”⁶⁶ Assume that in the past I successfully performed the intentional action that brought me into today’s state of ignorance. Specifically, my intention was to become ignorant of the moral implications of killing innocent people, so that in the future I would be able to kill members of another ethnic group without being aware of the immorality of that action. If I today kill, my ignorance about the character of my action will indeed be authentic—being ignorant today implies that I do not any longer comprehend my past action that brought me here. One’s freedom of action rests on one’s freedom of will, which is a mental condition.⁶⁷ One’s men-

⁶⁴ *Ibid.*

⁶⁵ It is possible, admits Zimmerman, to imagine people whose minds *are* open at the moment of transition: their “bringing it about to believe that *p*” would be indeed a basic action, “but the sort of case under consideration here is not like that” – *Ibid.*

⁶⁶ Zimmerman, “Moral...,” 418.

⁶⁷ *Ibid.*, 414.

tal capacity today is relative to one's mental states and actions in the past, meaning that the agent does not have direct control over his or her ability to judge today.

The empirical claim follows: the requirement of "at least indirect" responsibility practically comes down to no responsibility at all. It would be very unusual, and difficult to imagine, that I today: (1) decide to behave in a certain way guided by the idea that this behavior would bring me into a specific condition of moral ignorance; (2) form an expectation that my new moral views could once in the future create the opportunity for me to commit a morally wrong act for which—as a person who does not have the required knowledge anymore—I will not be responsible.⁶⁸

But at the end of one of the analyzed texts Zimmerman somewhat unexpectedly leaves his analytical framework, to conclude:

[...] I continue to maintain that such agents [Höss, Eichmann and Kelly—N.D.] are in all likelihood not to blame for what they have done. I know that this is a bitter pill to swallow, but I submit that it is true. If we ignore this truth, we run the risk of treating many individuals unjustly (a *great* many, I should think) and thus of ourselves becoming doers of evil (for which, I concede, we will likely not to be to blame, but that will not diminish the evil). Indeed, this is surely a risk that is realized every day. We must put an end to this evil we do.⁶⁹

So, Zimmerman departs from the claim that causes many people's intuitions to rebel, and then he offers its analytical defense. But the reasoning closes with a strong normative claim: to blame mass murderers for the evil they committed, equals committing evil. He takes Höss, Eichmann and Kelly as *examples*, to sharpen the importance of his analytical concern. But he fails to observe that the choice of the examples has redefined the coordinates of his theme. Moral philosophy that—either through examples, or by choosing its particular topic—engages with premeditated killing of innocent people, cannot pursue its line of reasoning without reflecting on the ways of justification, and the content of the murderers' moral beliefs. It should further ask about the ways of transforming beliefs in murderous intentions, justification of the decision to realize the intention through the criminal action, and moral consequences the crime creates. Failing to address these questions cannot be defended as a methodological preference for the analytical approach—this is an analytical mistake.

⁶⁸ "In the absence of any such cognitive connection between that for which an agent is directly culpable and its consequences, these consequences are not indicative of the extent to which the agent is culpable, and hence it seems quite inappropriate to say that the agent is culpable for them, even indirectly." — *Ibid.*, 420.

⁶⁹ Zimmerman, "Controlling..." 489.

Geoffrey Scarre tries to defend Zimmerman's thesis by asking some questions neglected in the original theory—he proposes to consider the cultural context. Montmarquet's demands for openness and a responsible reflective attitude to the questions of truth and value, rather than offering a guideline for a serious confrontation with the concrete problems of moral choice in hard cases, only formulate liberal virtues. This is not enough: "Sadly, our feelings do not shine out like beacons, illuminating the moral truth however corrupt our factual convictions."⁷⁰ The problem is not so much that people are typically less than fully open for moral considerations that would prompt them to reflect on the distinction between the truth and the lie, or right and wrong. The problem is that such openness, even if it could be achieved, "is not the epistemic panacea it might at first seem."⁷¹ Put simply, history teaches us that in border situations people are inclined to come up with the wrong answers to moral questions, even if they are capable of overcoming closed-mindedness, and of realizing that they are entering the transition into something wrong.

This is an important claim. It brings us back to the problem of comprehending the emergence and interiorization of the perverted ethics that precedes criminal practice. Let us assume, or let us reconstruct from the historical experience the following story.

We used to live as decent citizens in a community that acknowledged the principle of moral equality, both in the relationships among citizens, and in the way the state treated all its citizens. Then things somehow changed: the majority of those who used to be decent people sided with a militant extreme nationalist group, gradually accepting the group's ideology as their own value system. The group came to power "democratically," thanks to the support of the new majority, and it set forth to carry out its ideology, again with the majority support. Mass killing of innocent co-citizens, singled out on the basis of their belonging to a "less valuable" or "inherently evil" group, followed. After some years, the criminal regime collapsed, and the new regime opened the process of democratic transition. The following predicament transpires: the same people, who as the subjects of the criminal regime used to support the crime, or who at least used to refuse to comprehend evil, now become the citizens of the democratic regime. The regime officially closes the book on the past, claiming either that imperatives of the democratic transition do not leave room for the backward-oriented considerations, or that the forward-

⁷⁰ Scarre, 466.

⁷¹ *Ibid.*, 464.

looking transitional process renders such considerations obsolete, because legacies cease to matter at the rate at which we affirm democracy. So, yesterday's supporters of the criminal regime safely return to civilized normalcy, as individuals who allegedly clearly understand and accept the moral standards of decent society as their own.

This story reveals a frightening historical and moral dynamics. There used to be time in which basic moral standards were accepted across society. Then, these standards were abandoned both by the regime and most of its subjects, for the sake of hatred, moral ignorance and indifference. After the crime, the new regime and the majority of its citizens re-discover moral norms, as if nothing happened. Their transition from the state of not believing that p (the crime cannot be justified) to the state of believing that p (the crime is justified), seems to be smoothly annulled by their return to the state of not believing that p (the crime cannot be justified). Although we yesterday believed that killing innocent people was good, from today on we are set to believe that moral equality and democracy are valuable, and that therefore the innocent ought not to be killed (anymore).

Relativists would object that such reasoning fails to account for the inner logic of past events. The inner logic, Scarre would argue, is determined by the people's limited capacity to resist the perverted ethics on which the regime based its ideology. This insight into the fact of human weakness is supported by the sadly rich empirical evidence. We are manipulable beings in whose lives "fears and desires (conscious and unconscious) can play a large role in determining what we find plausible."⁷² Perhaps Zimmerman goes too far with his claim that conscientious adherence to a morally corrupt ideology can acquit the agent, but Moody-Adams is equally wrong when she argues that cultural context cannot possibly absolve from responsibility, and that moral ignorance is always self-induced. The truth, believes Scarre, lies "somewhere between these extremes." But what is the truth? Acknowledging the analytical power of Zimmerman's arguments, the empirical evidence provided by the thesis of cultural determinism, and accepting Moody-Adams' claim that cultures are not "conceptual prisons," Scarre will offer something that looks like a softened version of Arneson's thesis:

If we ask where precisely between these extremes the truth lies, the reply is that there are as many answers as there are individual predicaments. An agent's degree of moral responsibility is a function of a range of personal and situational factors, not all of which are within her control. Some of the agents of Hitler's will were patently better

⁷² *Ibid.*

equipped or more favorably situated than others to subject the claims and demands of the regime to critical scrutiny. Doubtless some Germans who were capable of assuming a critical stance failed to do so because they scented opportunities for personal advance so long as they toed the party line. Others may have failed to exercise properly their “power of taking care” from sheer laziness or cowardice or a liking for the quiet life, or from a conviction that people in authority must be wiser than they were. The basic moral principle here is that more is demanded from those who are capable of more.⁷³

“The basic moral principle” thus emerges as a combination of “personal and situational factors.” We determine the former through the identification and classification of the psychological patterns of behavior, following the assumption of the individuals’ unequal personal strength. Second, “situational factors” point to the relevance of the context for the person’s *ability to express* an autonomous judgment. One could critically observe that these are two different issues, which raise different moral questions, requiring different approaches. Ability to judge (the “personal factor”) asks whether the person in the context of collective crime remains the moral agent, or perhaps the pressure of circumstances nullifies one’s moral autonomy, excluding the perpetrator from the moral universe. When we say that a person in a criminal regime has ceased to be the moral agent, we exempt him or her from any responsibility for any action, including criminal ones. Consequently, his or her judgment about crime cannot be relevant anymore, in the same way the moral judgments of children or mentally disabled persons are irrelevant. On the other hand, “situational factors” can be understood as external obstacles to morally right behavior only if we agree that personal factors, understood in Scarre’s way, are not relevant. Situational factors, properly understood, exonerate the assumptively responsible agent from retrospective responsibility if it can be demonstrated that duress was such that nobody could justifiably require the agent to oppose the morally blameworthy practices. The moral status of an agent who does not oppose the crime because it is impossible, is incomparable with the moral status of an agent who endorses killing as a morally legitimate action. Only an assumptively responsible moral agent can be exposed to morally relevant duress, say in the form of pressure from the regime’s ideology and violent threats, that deprive one of the possibility to express a moral opinion about a crime, or to act in accordance with that opinion. The agent who “genuinely believes” that killing is morally justified will not be threatened by the criminal regime—this, I

⁷³ *Ibid.*, 468–469.

believe, should be one of the crucial features of any intellectually responsible social thesis.

In sum, Scarre's attempt to construct the "basic moral principle" as a combination of psychological, cultural and historical features, offers a wrong perception of both personal and situational factors. The claim is that moral evaluation of action cannot be based on the assumption of the agent's ability to judge. Again, nothing in Scarre's or Zimmerman's thesis justifies the crime, with the argument being constrained only to discovery of reasons which absolve those who "could not know" from responsibility. Indeed, our analysis shows that writers like Zimmerman and Scarre work against the background of two theses, both of which have a pretence to moral relevance. The first thesis argues that there can be no universal moral criterion for the judgment of responsibility of the agents who in different ways participated in the crime. The second thesis says that the criminal action itself remains unjustifiable. Still, consider the analytically uneasy rapport between the two theses. While universalism applies to the judgment of the crime as the moral fact, relativism applies to the judgment of moral responsibility of the agents. The crime is morally unjustifiable, while the perpetrators, or at least some of them, are not accountable—to properly address the question of their accountability requires exploring their intentions and actions relative to different external contexts and personal constraints, or a combination of these.

The argument fails to see that the two theses cannot and do not stand together. The relativist thesis taken seriously empties the human condition of any valid universal morality, hence rendering defenseless the thesis of the unjustifiability of a crime. To say that killing or otherwise harming other human beings is a universal and unjustifiable fact of moral wrong, and to proceed with the relativist thesis amounts to an analytical error. I am not arguing that all participants in mass crime are always causally responsible, nor do I claim that responsibility of all discrete individuals who belong to one of the subgroups of participants—perpetrators, collaborators, or bystanders—is equal. Circumstances matter, but in a manner that differs from the relativist exposition. Circumstances can be properly conceptualized as the specific reasons that perhaps provide for different measure of retrospective responsibility of concrete individuals, or altogether absolve some other concrete individuals of retrospective responsibility. This claim retains the presumption of their assumptive responsibility. As such, it is substantively different from the claim of relativism, which largely focuses on abandoning assumptive responsibility.

Put simply, the ability *to judge*, as the distinguishing feature of one's moral agency, is not context-dependent. What remains context-dependent is the capacity *to act* in accordance with moral reasons. Relativism denies this distinction, by reducing ability to judge to the contingent effect of circumstances. It claims that in a social, cultural, or historical context which upholds the standards of decency and moral equality, we can suppose that people are typically assumptively responsible. But when external conditions change, the internal ability to judge will crumble, depending on the type and strength of the blow to normalcy our society suffers, *and* on our character traits. A decent society produces moral individuals, while a rogue society undermines the moral decency of its members. Surely, these are all complex processes, which importantly depend both on human strength and on the character of the societal, cultural, or political crisis. But what really counts, according to the relativist argument, is that in such situations we cannot legitimately expect individuals to be autonomous agents anymore. Maybe some of them will be in a better position—due to their status in society or due to their stronger character—to oppose duress and manipulative socialization. And perhaps we can really, with Scarre, “demand more from those who are capable of more.” Indeed, this looks like the logically correct step, especially if we abandon the principle of moral equality and settle for the claim that a person's morality is a matter to be measured. The measure is calculated by dividing the power of the context by the individual's social position and psychological and mental qualities. When comparing the results of this calculus, we could—following for instance Arneson—assume that the bigger numbers denote one's higher position on the scale of moral capacities.

This brings us back to the introductory relativist distinction between the empirical and the metaethical thesis. Consider the way analytical relativism combines its formal reasoning with the normative claim that “the bitter pill has to be swallowed” in order to avoid a continuation of the evil practice that does injustice to people like Eichmann or Kelly. We learn that an analytically scrupulous approach is not enough to defend the relativist position. When Zimmerman makes the normative statements, he does not really claim that such a statement follows from the logic of the preceding analysis. By urging us to stop our unjust practices, he is building bridges back to the empirical thesis. The empirical thesis points to the independent force of culture, or to definite constraints imposed by the mental and psychological condition of an individual. Both culture and individual psychology appear as empirically given determinants of a person's morality. The conclusion then follows that the philosophical thesis

of moral relativism is parasitic on a certain perception of culture, or on a certain understanding of human psychology, or on both. These are not thematized, but are merely assumed as empirically valid. However, closer scrutiny would show that these are not empirical insights, but rather simplified interpretations of the alleged essence of culture and human character.⁷⁴ The problem is that the analyzed philosophical argument works only if we agree with the truth of the claims offered about culture and character in advance.

5 Gilbert Harman on the Non-moral Character of Extreme Intentions

Gilbert Harman introduces relativism as “a soberly logical thesis about logical form.”⁷⁵ This formula carries the claim that only relativism can meet the basic analytical demand for moral thinking: to identify conditions for the authority of moral judgments. Addressing this issue leads back to the meta-question of the very possibility and the sources of moral knowledge. Harman argues that not all judgments of “ought to/ought not to,” or “right/wrong” types qualify as moral judgments. We need to distinguish between “normative” and “moral.” “Normative” is the category of the assessment of a *situation*, while “moral” points to a *relation* between an agent and his or her action.⁷⁶

For example, any person, regardless of the social and cultural context of his or her life, can legitimately argue that the Nazi regime was bad, that it ought not to have existed, and that no argument can justify attitudes, intentions and practices developed there. Still, this is only a normative, and not a moral statement. Why? This is an example of an external, or, in Harman’s terminology, a non-inner judgment. We who are not the actors in a particular social context in which a practice has been developed, can pass only a non-inner judgment on that practice—not being group members, we cannot analyze and assess the relationship between the agent and the action. To be able to evaluate an action morally, I have to be in a relation of “relevant moral understanding” with its agent. This relation is the only legitimate basis of the *inner judgment* about a practice. The exclusive

⁷⁴ Michele Moody-Adams, *Fieldwork...* 83.

⁷⁵ Gilbert Harman, “Moral Relativism Defended,” *The Philosophical Review*, Vol. 84, No. 1, 1975, 4.

⁷⁶ Harman, 6.

authors of such a judgment (in Harman's terminology, the *speakers*) are the persons identified as members of the group within which the action happens, that is, the persons who share group membership with the agent. Harman identifies the process of reaching the point of "relevant moral understanding" as bargaining. Its result is morality itself, understood as "an implicit agreement about what to do."⁷⁷ So, I qualify to pass a moral judgment on another person's actions on the basis of our shared, contractually shaped, and morally relevant membership in a group. Only as a group member am I entitled to say that another group member was duty-bound to behave in a certain way in a certain situation, and entitled to evaluate his or her behavior as morally right or wrong.

So, we have the social thesis, which points to the group-specific character of morality. But what is specifically moral in this agreement and the ensuing inner judgment? Can this construct escape the trap of conventionalism, where moral standards would be reduced to patterns of thought and action that have been agreed on, or simply socially transferred? In response to this challenge, Harman addresses the issue of motivation, arguing that moral judgment does not address the action itself, but rather the motivational properties of our special relationship: "We make inner judgments about a person only if we suppose that he is capable of being motivated by relevant moral considerations."⁷⁸ This means that at the core of inner judgments we find the shared motivational attitudes between speaker and agent, attitudes presented as the "sameness of moral considerations" that guide our thoughts and actions.⁷⁹

But, once again, the "sameness of moral considerations" still seem firmly anchored in a type of relativism that endorses the validity of local conventions. Harman seems to uphold this position when he makes the following claim: the speaker can say that the agent should not have done what he or she did only if the speaker accepts that the agent had reason to act the way he or she acted. The speaker should "in some sense endorse these reasons and suppose that the audience also endorses them."⁸⁰ Still, being aware of the problems that could follow from this statement, Harman reminds us that moral agreement is not about the facts of an action,

⁷⁷ *Ibid.*, 13.

⁷⁸ *Ibid.*

⁷⁹ David Thunder, "An Argument against the Relativism of "Inner" Moral Judgments," Manuscript, 1998, available at <http://www.nd.edu/~dthunder/Articles/Article2.html>. This text provides an excellent analysis of Harman's argument.

⁸⁰ Harman, 8.

nor about attitudes, but about relevant *intentions*, identified in the process of bargaining.⁸¹ A more precise definition then says that morality is an implicit agreement about the intentions that qualify as right in internal group relations. Only intentions, understood as desires and goals guiding our actions, adequately reflect the social conditionality of our life together. Therefore, to say that the speaker endorses the agent's reasons for an obviously wrong action, does not imply the speaker's endorsement of the action itself. It only refers to the speaker's affirmation of the agreement on intentions. If a member of my group kills an innocent person, my acknowledgment of his or her reasons for this action only means that I understand the logic of his or her goals and desires in the context of the shared intentions that form the core of our common morality. In this way I only affirm the moral point of view itself. By endorsing the killer's reasons, I say simply that the killer and I have somehow and sometime tacitly agreed on sharing the same moral universe. It is *only from here* that I can proceed by saying "you ought not to have done this; your action was wrong." This is a moral judgment. In expressing it, I am conveying the message to the killer that by committing the crime he or she broke the terms of our implicit agreement, which comes down to violating the valid rules of moral communication in society. For this action, the agent deserves the moral sanction of blame.

How does this abstract theory work when applied to concrete cases in specific contexts? Harman explores Hitler's case, looking for the proper moral understanding of his role in the Holocaust, and, more generally, for the proper moral attitude towards the whole practice of the Holocaust. Anyone is entitled to make a normative, that is, the non-inner and hence non-moral judgment about the Holocaust, and to assess it as a practice that ought never to have happened. In the same way, anyone can infer that what Hitler did was wrong. Following Harman's exposition of the analytical conditions for inner judgments, we would expect that only Germans could say that Hitler's intentions were *morally* wrong. But, Harman here makes an interesting theoretical turn, arguing that in Hitler's case even Germans cannot reconstruct an inner, moral judgment: "It sounds odd to say that Hitler should not have ordered the extermination of the Jews, that it was wrong of him to have done so."⁸² What would be "odd" in a German stating that Hitler's intentions were morally wrong, or that the Holocaust was morally wrong, given that it would be a clear instance of "inner

⁸¹ *Ibid.*, 13.

⁸² *Ibid.*, 7.

judgment”? The moral judgment does not work here, argues Harman, because it is too *weak*—the speakers come to realize that Hitler’s actions were so terrible that they placed him beyond the scope of moral consideration. Hitler remains “beyond the pale.”⁸³

This is where a sophisticated theoretical model reaches its limits. By claiming that “Hitler is beyond the pale,” Harman uses a concrete extreme example to make a generalizable inference: distinguishing between external and internal judgments is not a sufficient condition for a precise demarcation of the status and the meaning of morality. As persons in the relation of “relevant moral understanding,” we realize that distinguishing between right and wrong intentions is sometimes a matter of degree. However, some intentions transpire as so gravely and indisputably wrong that they obstruct the basic meaning and the very possibility of “moral understanding”—it is not possible to acknowledge the moral terms of the internal group relationship anymore. The (realized) intention to kill the Jews or the Bosniaks tells us about abandoning the background moral understanding. The society has entered a new condition, to which moral criteria do not apply anymore. It follows that moral judgment about mass crime and its agents is not possible because the agents’ intentions and actions remain “beyond the motivational reach of the relevant moral considerations.”⁸⁴ Or, they do not fit into the logical form of inner judgments.

This is perhaps an attempt to defend the theory against a charge of conventionalism. Exploring German Nazism, we can indeed reconstruct both the bargaining process and the resulting implicit agreement. But the fact that the regime as the agent, and the majority of subjects as the speakers, acted in concert against the backdrop of what appeared as shared moral understanding, does not grant the status of legitimate morality to the intentions behind the joint acceptance of the mass crimes. Then, a relativist who sees morality as logically possible only within the unique group experience, but who does not want to concede to clearly wrong practices, can only deny any moral status to such an agreement. But, if this reading is accurate, then the category of the “motivational reach of the relevant moral considerations” challenges the whole formal logical structure on which Harman’s relativism rests. If this category requires denying morality of intentions that we find to be “beyond the pale,” it works as an objective moral standard.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, 8.

The serious problem is in the way Harman steps out from his theory to account for the objectively wrong intentions and practices. By asserting the weakness of the moral argument in the face of evil, we say that overstepping *some* borders—having some kind of intentions and doing some kind of things otherwise identifiable through the categories of the inner moral “wrong” and “ought not to”—pushes the whole issue beyond the reach of moral evaluation. If the logical explanation and rational justification of morality fail when confronted with events like the Holocaust, we are perhaps left with the possibility of a descriptive account. However, Harman concedes that there can be no normatively neutral and morally disengaged description of mass crime. Contrary to his original analytical plan, Harman then completes the theory with a *normative* statement: morality is relative to social contexts, but it can happen that at certain historical moments the place of basic moral distinctions is won over by deeply wrong motivational considerations shared by a majority of the group members. Resulting intentions and practices cease to be morally relevant precisely because they are unacceptable in a perspective that demands that the fundamental inner judgments are right. But if this is the case, we are back to square one. If a relativist cannot unambiguously state that any inner judgment provides for a valid moral perspective, then the existence of the objective criteria for the assessment of any particular intention or action, could logically follow. This again comes close to moral universalism.⁸⁵

⁸⁵ Gowans, 7–8.

Chapter Four

Moral Responsibility for Collective Crime

1 Introduction

In this chapter I will claim that dealing with collective crime in a morally proper way requires addressing the question of collective moral responsibility.

The question can be formulated in the following way: is it right to inquire about the responsibility of all persons who belong to a group in whose name a crime has been committed? Or, alternatively, can we think of the responsibility of a group as a distinct agent? I will defend the first alternative: moral responsibility applies to all members of the group, and should be distributed (unequally) among them. I will try to explain and justify this claim by pointing to the already identified factors¹ that define the collective crime: the nature of the criminal regime, the nature of the relationship between the regime and its subjects, the elements of the crime itself (its ideological foundation, the number of victims, the way victims are chosen, the number of perpetrators, supporters, and bystanders), and the moral condition of the post-criminal society. I will add one more factor, which in itself is not crime-specific, but which obtains a new meaning in this particular context: the moral character of the relationships among members of the group.

The chapter is divided into four sections. Section 1 brings in the general idea of responsibility, followed by a conceptualization of moral responsibility. Then, I introduce one of the main features of my understanding of the concept: its relational character. This is the first step in developing the argument that some people can sometimes be accountable for actions of which they are not agents.

¹ See Chapter One.

Section 2 explores groups. It opens by pointing to intentional actions performed jointly, by two or more individuals. Does it make sense at all to go beyond individual agency and talk about collective actions? Methodological individualism importantly claims that everything that shapes society—institutions, structures, or processes—comes down to individual intentions and actions; likewise, relationships exist only among discrete individuals. But methodological individualism fails to observe that individual properties it focuses on—preferences, intentions, and actions—are all relational categories, and that the sense of relationship goes much deeper than a particular link among concrete individuals. Following Larry May, I will argue that groups do matter, and that they are best comprehended in terms of *the group structure*, understood as a stabilized set of relationships among group members.² Turning to intergenerational non-voluntary groups, and further relying on May's insights, I will point to solidarity as the normative basis of their structure. Here I will also introduce the category of shared identity. In the next step, I will explore the relational and positional features of collective action.

Section 3 addresses the question of collective moral responsibility. Living with others in morally important relationships implies that sometimes we will be affected by attitudes, intentions, and actions of our fellow members. This also holds for morally blameworthy actions. One question then concerns responsibility for a collective action (or, alternatively, a failure to act together) that has produced a blameworthy result. A straightforward answer—that responsibility rests with agents of the action (or, alternatively, with agents who should have acted but failed to do so)—does not hold in all situations. Sometimes some members of a group will act as representatives of the whole group, in a way that perhaps does raise the question of responsibility of *all* group members. In order to understand whether it is analytically accurate, and normatively justifiable to extend responsibility for a collective intentional action to group members who did not (at least, not directly) participate in it, it is necessary to attend to several questions. The first concerns the objection of normative individualism, which claims that collective responsibility violates the foundational liberal idea of individual moral autonomy. For proponents of collective moral responsibility, the most plausible strategy of responding to this challenge consists of extending the notion of participation in the collective action. I will shortly analyze the ways in which Christopher Kutz and

² Larry May, *The Morality of Groups. Collective Responsibility, Group-Based Harm, and Corporate Rights* (Notre Dame: The University of Notre Dame Press, 1987), 3.

Larry May identify the scope of a blameworthy collective action and its agency. I agree with May and Kutz that no collective action performed in the name of the whole group implies direct or indirect participation of all group members. I also agree that people, who—in terms of their attitudes, intentions, and actions—did nothing morally wrong, cannot share the blame for a blameworthy collective action performed in their name. Still, I will argue that such people can, under some conditions be morally responsible for such actions. There are actions that disrupt the morality of the group structure in a manner that affects the moral standing of decent persons. I will distinguish between causal and identity-specific reasons for collective moral responsibility.

Section 4 focuses on the claim that collective crime makes all members of the perpetrators' group morally responsible. The core argument is a specific understanding of the correlation between individual and collective identity in the aftermath of moral catastrophe. Decent people are non-vicariously responsible because of the morally important ties that bind them to those who are morally blameworthy. To demonstrate this, I will ask what happens to solidarity in the criminal and post-criminal contexts. An important claim will be that the crime-induced change of the group structure taints everyone's moral position and relationships. Following the methodological position of socially mediated individual autonomy, I will distinguish among subgroups created by crime, and show how the violation of the principle of moral equality creates context-specific asymmetrical duties. In this new relationship, decent persons are marked by moral taint. Finally, I will explore two forms of collective moral responsibility that apply to decent people.

2 Conceptualizing Moral Responsibility

2.1 A PRELIMINARY DEFINITION

Responsibility is a category that deals with the question of the proper attitude towards a person, his or her intentional action, and the outcomes of that action. True to the etymology of the word, responsibility rests on the assumption that there are situations in which a person's action (or omission) warrants a response of some kind. This however applies only to persons who are prior to any action already recognized as accountable agents. When such an agent acts, we will typically look into the causal link between his or her intentions on the one hand, and the performed action on the other. We will also look into the causal link between the action and its outcomes.

Some actions are morally significant, and they demand particular moral answers of praise or blame. Moral responsibility is first a requisite set of properties and faculties for an agent without which neither praise nor blame can be ascribed for his or her action. Second, moral responsibility is a set of conditions under which a particular action and its agent can be justifiably rewarded or condemned. This introductory identification suggests that responsibility exists in the interplay between the agent's faculties and actions on the one hand, and a particular relationship that ensues on the other. In terms of agency, the relational quality of responsibility can be of two kinds. First there is self-reflection, where I morally judge my goal, the intentional action and its outcome, ending up with blame or praise for myself. The second type of relationship is between the agent and other people: the action that is the subject of moral scrutiny, is evaluated by persons other than the agent. The object of evaluation is complex: we judge agents, their intentions, goals, actions, and consequences of such actions. This evaluation is undertaken against the background of an already existing relationship.³

Questions abound. What does relational quality of moral responsibility exactly mean? Who can be a moral agent, that is, what qualities a person has to possess and demonstrate to qualify for moral judgment? Are a capacity to grasp moral reasons and to freely choose, intend, and control the course of one's actions necessary prerequisites for bearing responsibility for a particular action? Alternatively, can there be moral responsibility if some of these features are absent? Is responsibility attached exclusively to agency, or can there be situations in which we can assign responsibility for an action to persons who did not take part in that action? How to determine whether conditions of responsibility are met in particular cases?

Each of these questions is complex, and answering them all would probably come close to a comprehensive theory of moral responsibility. But my aim is more modest. I want to provide an interpretative approach to moral responsibility, which would be capable of addressing the moral condition of members of a post-criminal society. Thus, in the following discussion I will focus on outlining only a basic —and, I hope, reasonably

³ "When I claim, then, that *A* is morally responsible for *x*, all I am saying is that *x* is appropriate material for moral scrutiny (according to the moral theory in use) and that any moral undesirability or desirability that attaches to *x* attaches as well to *A*." — Eugene Schlossberger, *Moral Responsibility and Persons* (Philadelphia: Temple University Press, 1992), 101.

reliable—account of moral responsibility, and continue by using it for the elucidation of a more controversial concept of collective moral responsibility. The applicability of this concept of collective moral responsibility would be limited to the context outlined by collective crime.

To begin with: what does it mean to be responsible?⁴ The term can be used in different connotations. First, those who qualify as agents can be praised as being responsible, or criticized as being irresponsible. This is *responsibility as a virtue*, or a valued character trait, the presence of which describes a person as trustworthy.⁵ In a second, more important connotation, an agent has to possess certain qualities, on the basis of which his or her actions qualify for judgment of responsibility: only mentally capable adults can be agents. Taken in this sense, the responsible agent is a person who has the ability to judge, that is, to understand his or her intentions and actions in light of moral requirements. It is important to note that this requirement goes beyond a mere identification of the fact that alternate possibilities exist. At its core this means a specific normative competence for practical reasoning, which assumes both the existence of valid moral standards, and one's capacity to identify and apply those standards in intention, choice, and action.⁶ Below I will argue that moral standards are not simply rules to which persons have to subscribe; rather, they are supposed to be each person's own standards at a given time. I do not primarily accept moral standards because they are externally binding on me, but because—to the extent I am an autonomous person—I have them interior-

⁴ The question opens with one of the most widely contested metaphysical issues in moral philosophy: the free will vs. determinism debate. Roughly, the concept of free will points to the unconstrained ability to choose and control one's course of action. Determinism, on the other hand, argues that there can be no free will, given that everything in the universe is ruled by objective natural laws of causality. Whatever a person does is explainable in terms of these laws. Accepting determinism leads to a denial of the very possibility of holding anybody responsible: to explain Eichmann's behavior, we would need the science of neurology, to tell us how his brain had been working; he himself had no choice but to act in the way he acted. Those who argue for the complete absence of free will are incompatibilists. The other position is compatibilism: while objective causal laws are relevant for a proper conceptualization of the human condition, they are not of such a nature as to simply and irrevocably deny our freedom of choice. In this text I will assume that in very many situations we do have alternate possibilities; thus, I accept the compatibilist position.

⁵ Garrath Williams, "Responsibility," The Internet Encyclopedia of Philosophy, available at <http://www.iep.utm.edu/r/responsi.htm>.

⁶ Hilary Bok, *Freedom and Responsibility* (Princeton: Princeton University Press, 1998), 123.

ized as the core of my own values.⁷ A person with such normative competence has a general duty to be responsible. Recognition of moral standards creates “moral *obligations*, and these in turn are supported by principled justifications and are focused on the choices expressed in what people do.”⁸ This is *assumptive, or prescriptive responsibility*. Third, the assumptively responsible agent will be typically considered accountable for all intentions, actions committed, and their outcomes—this is *causal, or retrospective responsibility*.⁹ Its direct link to assumptive responsibility is not constrained to the identification of agency. To say that only moral agents can be retrospectively accountable means that we will be using moral standards constitutive of agency in evaluating the actions of agents and in assigning moral sanctions. Violation of moral standards stands for failure to follow one’s moral obligations; the agent has failed to live up to moral expectations that are determined by recognizing him or her as a moral agent.¹⁰

Expressed differently, concepts of assumptive and retrospective responsibility frame a distinction between identity and faculty (being a responsible agent) on the one hand, and accountability for action (being responsible for past intentions, actions and their consequences) on the other. In assumptive terms, a person is a responsible agent if he or she is able to distinguish right from wrong. In retrospective terms, a responsible agent is accountable for having committed right or wrong acts. Both aspects are needed for a proper account of responsibility.

The causal relationship between the agent, his or her actions, and the consequences that occur, has two aspects: objective and subjective. Objective causality, which is simply the chain of events that led to a consequence, is fairly easy to establish. For instance, if in a porcelain store I knock down a valuable Chinese vase and it breaks, there will be an agent, an action, and a consequence. But the subjective moment of causality creates some difficulties. If an act—in our case, the knocking of the vase—could be ascribed to me, I would be responsible for the consequence only if it can be demonstrated that I performed my action inten-

⁷ “To view people as responsible in this sense is to see them as autonomous agents who are reflective about their lives, who have a set of values or commitments sufficiently structured to constitute what we might call a ‘conception of the good,’ and to advance that conception in their action” – R. Jay Wallace, *Responsibility and the Moral Sentiments* (Cambridge, Mass.: Harvard University Press, 1994), 53.

⁸ *Ibid.*, 16.

⁹ See e.g. Kurt Baier, “Guilt and Responsibility,” in Peter French (ed.), *Individual and Collective Responsibility: Massacre at My Lai* (Cambridge, Mass.: Schenkman, 1972), 49.

¹⁰ Wallace, 63–64.

tionally, that is, freely and consciously. Three elements of subjective responsibility are introduced here, bringing together its assumptive and causal aspects. The first is already mentioned specific human quality of normative competence: the ability to judge and act in accordance with moral reasons, that is, to distinguish between right and wrong, and to orient our choices and intentional actions accordingly. The faculty of judgment, as a subjective individual quality, exists prior to, and independently of the act itself. Provided I possess it, I am assumptively responsible for all my past, present and future actions. An important conclusion follows: the ability to judge is context-independent. In other words, no external context, however difficult it may be, can possibly deprive me of this normative competence.

The second element is more specific, and consists of the intention to take a particular action. I act intentionally when I have a goal, and when I decide to act towards achieving an outcome which I see as the fulfillment of that goal. The indispensability of intention for responsibility may be obvious. I act because I want to act, and I want to act because it is my aim to achieve something: my goal, intention, action, and its outcome are all matters of my judgment and choice.¹¹ Still, I may be able to judge that breaking the vase is wrong, but what if I did not intend to do it? If someone pushed me so strongly from behind that I fell over the table and hit the vase, there would be no judgment, free choice, goal, or decision. There would be, however, my action, and its result: although I did not want to break the vase, I did. Still, given the irresistible coercion applied against me, and the lack of intention, I will typically not be held responsible. The idea that only freely intended and performed acts are subject to responsibility judgments seems uncontroversial.¹² Moral autonomy as the essence of assumptive responsibility presupposes one's freedom to reflect, form and carry out intentions. If I am deprived of such freedom, and if I am forced into a bodily movement either by human coercion or by a natural force, then such a movement—although it looks like an action—does not qualify as the subject of a responsibility judgment. Thus, a full account of subjective responsibility needs an additional feature, without which the

¹¹ R. A. Duff, *Intention, Agency and Criminal Liability. Philosophy of Action and the Criminal Law* (Oxford: Basil Blackwell, 1990), 99: "To act with the intention of bringing a result about is to make myself fully responsible for that result—I must be ready to answer for (to explain, to justify, to accept criticism for) my action of bringing it about; and I bring about intentionally those effects for which I am held responsible."

¹² Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge: Cambridge University Press, 1999), 174.

status of intentional action cannot be fully grasped: freedom of choice, or the presence of alternate possible courses of action.¹³ In difference to the faculty of judgment, freedom of choice is susceptible to the influence of the context in which an action takes place.

Preliminarily, we can say that freedom of choice is affirmed if an act is intended and committed without external pressure. We can call such an action voluntary, given that its “first principle is in the person itself when he knows the particular circumstances of the action.”¹⁴ Freedom of choice thus appears as a condition of the agent’s autonomous intention. In consequence, the lack of freedom of choice means that the ensuing action is not autonomous either, which eventually absolves the agent from responsibility. Such a lack of freedom can appear in two broadly outlined forms. First is unintended action—an action that is caused either by a natural force or by the force of another person, which the agent was not able to oppose. Using the familiar example, if I am pushed from behind, the lack of both intention and freedom of choice in my action is obvious. Second, there can be situations in which we act intentionally, but circumstances—again, produced either by nature or other people—force us to intend and act contrary to what we would have chosen had we been free. In a slightly changed version of my example, if someone threatens me with a gun and orders me to smash the vase, I will most likely do so, although I am fully aware that such an act is wrong. Note that in this case intention is not missing: I decided to perform a certain bodily action, with the goal to bring about the blameworthy outcome. Freedom of choice is not clearly missing either: I could have decided to reject the order. Still, given the nature of the threat that deprives me of autonomy, it could be argued that the intention was not really mine and that I was actually deprived of freedom of choice—my act is not considered voluntary.

¹³ This claim is not uncontroversial. Harry Frankfurt, who famously introduced the term “the principle of alternate possibilities” (“a person is morally responsible for what he has done only if he could have done otherwise”) argues that the principle is mistaken in its simple, affirmative form, and that it requires revision which would bring it in line with determinism: “[...] a person is not morally responsible for what he has done if he did it because he could not have done otherwise” – Harry G. Frankfurt, “Alternate Possibilities and Moral Responsibility,” *The Journal of Philosophy*, Vol. 66, No. 23, 1969, 829–839. In a different approach, R. Jay Wallace develops his compatibilist account on responsibility by arguing that freedom of will is indeed incompatible with determinism, and that compatibilism should focus only on the quality of normative competence when defining a moral agent – Wallace, 86.

¹⁴ Aristotle, *The Nicomachean Ethics* (Cambridge: Cambridge University Press, 2000), 40.

In both situations, the circumstances absolve the agent from blame for a failure to intend and do the right action, or prevent the wrong action. Such exculpating circumstances include the lack of mental competence, force, threat, duress, necessity, and ignorance. Moral philosophy that focuses on responsibility devotes much attention to these circumstances, classifying them into different types: exemptions, excuses, justifications, and moral dilemmas.¹⁵ Their analysis demonstrates that responsibility cannot be thematized without considering conditions in which persons live and the particular context in which each of their actions unfolds. The general argument is that responsibility is affected by external factors, including circumstances of particular actions and various types of agent's relationships with other people:

Whenever people are genuinely excused from responsibility for their actions, those actions will not have been morally wrong. Obligations regulate the choices that are expressed in action, but when a valid excuse obtains, it turns out that what an agent has done did not express a choice at odds with the moral obligations to which we hold that agent.¹⁶

Derived from these insights, a standard notion of responsibility rests on the link between autonomous intention, free action and ensuing outcome. In this account, situations that absolve from responsibility are those in which the agent has no control over his or her intentions, actions, and the consequences which he or she knows would occur, and whose character he or she, as an autonomous person, is fully aware of. In criminal law this would be the argument against accountability for an action that has produced an otherwise punishable consequence. It looks as if there is no reason not to extend this argument to the analysis of moral responsibility. I would not be morally accountable for failing to observe distinction between right and wrong if I had no control over my action, that is, if a particular outcome resulted from my justifiable factual ignorance, or from me being forced to act against my knowledge of the nature of the action, its likely consequences, and against my moral conviction. It would follow that moral responsibility always presupposes fulfilling all the conditions

¹⁵ The point of reference remains Aristotle's *The Nicomachean Ethics*, especially its analysis of "mixed situations." For contemporary contributions, see e.g.: J.L. Austin, "A Plea for Excuses," in J.L. Austin, *Philosophical Papers* (Oxford: Clarendon Press, 1961); H.E. Mason (ed.), *Moral Dilemmas and Moral Theory* (New York: Oxford University Press, 1996); Martin Fischer and Mark Ravizza (eds.), *Perspectives on Moral Responsibility* (Cornell: Cornell University Press, 1993); Bernard Williams, *Moral Luck. Philosophical Papers 1973–1980* (Cambridge: Cambridge University Press, 1981); Wallace, *op. cit.*

¹⁶ Wallace, 147.

that determine the basic notion of responsibility. The agent should be considered responsible only if all the subjective and objective conditions are met. However, I believe that this is not an axiomatic claim that would be valid in all situations in which the question of responsibility is raised. In the rest of this chapter I will argue that collective moral responsibility is a plausible idea. The idea does not necessarily challenge the outlined complex interplay between intention, freedom of choice, and the action. But, as I indicated, my claim is that responsibility can extend beyond causal involvement in a collective action. There can be situations in which group members can be held accountable for an action and its consequences, although they are not agents of that action, they do not share agents' goals, and are not capable of preventing action. To defend this claim, I first need to deepen the account on the relational quality of responsibility.

2.2 RESPONSIBILITY AS A RELATIONSHIP

Praise and blame, as responsibility-specific answers to an action, mainly originate from other people's evaluation of the agent's behavior. This does not deny the self-reflective quality of responsibility, but the claim is that our moral agency is principally affirmed in our relationships with other people. Before explaining this, it is timely to make a short excursion, and recall that with Immanuel Kant we can think of praise and blame coming principally from the agent, as a self-response. Kant sees responsibility as an essential property of the autonomous person. Being autonomous, I can understand the meaning of my freedom and moral laws that govern it, telling me how I ought to act. Therefore, my autonomy does not equal freedom of choice. As a morally competent person, I am duty-bound to choose the morally right course of action. In result, as a person capable of understanding the significance of my actions, I have a duty to evaluate my choice and action from the perspective of the true laws that regulate my freedom.¹⁷ This emphasis on self-reflection does not imply that rela-

¹⁷ "Now, man as a natural being that has reason (*homo phaenomenon*) can be determined by his reason, as a cause, to actions in the sensible world, and so far the concept of obligation does not come into consideration. But the same man thought in terms of his personality, that is, as a being endowed with inner freedom (*homo noumenon*), is regarded as a being that can be put under obligation and, indeed, under obligation to himself (to the humanity in his own person). So man (taken in these two different senses) can acknowledge a duty to himself without falling into contradiction (because the concept of man is not thought in one and the same sense)" – Immanuel Kant, *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1991), 215.

tionships do not matter at all. But the moral worth of an action is independent of how other people evaluate it. I may be successfully hiding my Jewish acquaintances from Gestapo, thus saving their lives. Once the atrocities are over and the criminal regime is overthrown, decent people will most probably praise my choice and action. But suppose I acted on a consideration of the situation, which led me to the conclusion that the regime was doomed to failure, that helping my acquaintances would not actually expose me to any significant risk, while possible benefits in the future would meet my desire for social recognition and reward. The fact that after the atrocity I receive praise as a morally virtuous person, does not change the moral value of what I did: it was not a morally right action. This is the case, because the only criterion of praise and blame is the motivation that propels one to act. My behavior is morally right if I do not act for the sake of some expected benefit, or on momentary inclination, even if that inclination is to selflessly help others. The only morally right motivation consists in acting on "good will." Good will is not my psychological state, neither is it exclusive to me as *my* moral inclination. It is the essence of my moral worth, for it implies the motivation to act under the universal moral law: acting on good will means acting *from duty*.¹⁸ How other people judge me, eventually, does not matter.

Kant's approach poses difficulties for some students of responsibility, mostly because of his attitude to the interpersonal feature of the concept. The objection says that responsibility is more than the agent's capacity to critically reflect on his or her action against the background of universal moral laws. Insistence on the primacy of self-reflection fails to recognize that even "self-reflexive responses to accountability [...] are fundamentally relational."¹⁹ If I feel ashamed by what I have done, this is not only because of my awareness of the breach of moral law. Or, it is perhaps more accurate to say that validity of moral laws is not mainly a matter of the agent's self-reflection. These laws (are supposed to) shape human relationships, as normative standards of mutual accountability,²⁰ which define duties that moral agents have towards one another, and which form the basis of legitimate reciprocal expectations. If I do wrong, it is the na-

¹⁸ Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge: Cambridge University Press, 1998), 10–12.

¹⁹ Christopher Kutz, *Complicity. Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000), 36.

²⁰ Garrath Williams, "Two Approaches to Moral Responsibility. Part One," *Richmond Journal of Philosophy*, Vol. 6, Spring 2004, 19, available at www.richmond-philosophy.net/rjp/back_issues/issue_6.pdf.

ture of my relationship with others that prompts them to blame me, while prompting me to feel ashamed.

In the following sections I will offer a more precise elaboration of the complexity of the relational quality of responsibility. Let me close this section by referring to the introductory distinction between assumptive and retrospective responsibility, to reemphasize their relational quality. The relationship of assumptive responsibility consists of rules and principles that combine into standards of mutual accountability for the right behavior. Retrospective responsibility, on the other hand, deals with a particular relationship contextualized by a concrete action. It involves at least two persons: the agent and the addressee. The responsibility relationship between them is fundamentally the relationship of *evaluation*, based on shared moral standards. If my action is aimed at you, and if it produces certain consequences for you, then it will lead to your evaluative response: you will either praise or blame me. In addition, you will also expect that I evaluate my own intention and action in the same terms. Thus, an action that warrants response establishes the new relationship between the agent who acts and others, whereby those others have the right to make judgment, establish sanction and to demand a certain type of reaction of the agent.²¹

3 Social Groups

The account on responsibility offered in Section 2 simply assumes individual agency. I would like to argue that it does not suffice, because some intentions and actions can be assigned to more than one agent. Reference to “more than one agent” does not point to a mere aggregate of individuals. Intending and acting together implies a special relationship among persons engaged. How does this relationship influence the notion of responsibility? I will claim the relevance of collective moral responsibility, derived from the character of the interpersonal relationships in a group. The first question concerns the agency in the case of collective moral responsibility. The answer requires attending to the notion of a collective, or group. What is a group? What types of groups can there be? In what relationship do groups stand with the individuals who are their members? Do groups have preferences, interests, intentions, or values of their own? In

²¹ “The meaning and consequences of what someone did and the response thereby warranted are a function of the perspective of the respondent and of the relations (or position) between the parties” – Kutz, 9–10.

other words, can we see groups as agents, and specifically, can we see them as moral agents?

At the core of modernity we find a primacy of individual autonomy and the corresponding concept of individual identity. Still, it might be a truism to say that society—or any group within it—is more than a sum of individuals. As group members, we enter different relationships, which would not be possible outside the group. We share values and abide by norms which are not individual-specific. We take actions which no individual can perform. Some of these relationships and actions are morally important. Thus, an analysis of groups is at order.

3.1 THE CHALLENGE OF METHODOLOGICAL INDIVIDUALISM

The introductory account offered above does not say much about the nature of groups. Neither is it generally accepted. The question is sometimes asked: what, if anything, can reference to groups tell us about the human condition, about people's values, preferences, intentions, actions, or their outcomes? Not many scholars would challenge the existence of groups, but some would dispute the explanatory power of this category. The standpoint of methodological individualism is well known. While not denying social phenomena, methodological individualists will typically argue that such phenomena are analyzable and explainable in terms of individual preferences, intentions, and actions. Max Weber famously stated that "social collectivities, such as states, associations, business corporations, foundations [...] must be treated as solely the resultants and modes of organization of the particular acts of individual persons, since these alone can be treated as agents in a course of subjectively understandable action."²² Leaving aside the complexity of Weber's notion of individual action, it is important to note that for him the reference to methodological individualism as a scientifically proper mode of explanation does not point to the irrelevance of different collective phenomena. Rather, individual action is central because no social fact can be explained without reference to motives and intentions. Given that these two are subjective categories, the methodological primacy of the analysis of individual action follows.

The standpoint of methodological individualism will later change, especially with the advent of the theory of rational choice. For instance, Jon

²² Max Weber, *Economy and Society. An Outline of Interpretative Sociology. Part I* (Berkeley: University of California Press, 1978), 13.

Elster does not simply claim that methodological individualism provides the best approach to a complex reality. The argument is that reality itself is far less complex than those who point to the conceptual relevance of groups would think. Whatever we say of collective relationships, structures and dynamics can, and indeed, should be conceptualized in terms of individual preferences and relationships. The causal link between intention, action and consequence exists only at the level of individual agency.²³

The individualist thesis is both simple and far-reaching, and it could be called the thesis of naturalistic reduction: what we cannot see and experimentally confirm are merely interpretative concepts without explanatory value. Paul Sheehy observes that “the appeal of reduction is held to be its ontological economy and conceptual unity in promoting explanations and descriptions couched in unifactorial terms.”²⁴ In order to defend their claim, methodological individualists would have to demonstrate that each concrete relationship has its own norms, which are in turn based on the pre-relational features of each participant. However, this should not end as a thesis supporting the autonomy of concrete individuals in setting up case-specific norms for each relationship they enter, for this would clearly lead to unpredictable consequences. Then, the only way to defend the individualist case is to argue that the power of human rationality yields norms of behavior which are both agent-specific and generalizable. In other words, because of some innate features of individual rationality, we can make general statements that hold good for all discrete humans, but only for discrete humans.

It is perhaps not difficult to agree that collectives are composed of individuals. I would also agree that an analysis of groups is essentially the analysis of individuals in relationships. But the real question concerns the nature of these relationships. Methodological individualists argue that relationships reflect pre-relational individual preferences and emotional states. This is wrong. The mistake is simple and it consists of a failure to see that individual interests, preferences, beliefs, desires, values, intentions, and actions are all relational and dynamic categories. We do not enter relationships with other people with a definite, predefined baggage

²³ Jon Elster, *Nuts and Bolts for the Social Sciences* (Cambridge: Cambridge University Press, 1989), 13.

²⁴ Paul Sheehy, “Individualism in the Social Sciences,” *Richmond Journal of Philosophy*, Vol. 4, Summer 2003, 32, available at http://www.richmond-philosophy.net/rjp/back_issues/issue_4.pdf.

of individual features—rather, each of us is being continuously (re-) shaped in the course of these relationships. This should not be read as an organic or a communitarian stance. I do not claim that groups conceptually precede their members, that individual identity is shaped exclusively or mainly by membership in a group, or that methodological primacy should be accorded to the group perspective. The claim is only that within each group there exist a multitude of “various forms of interrelations, which are not amenable to abstraction to a single ideal kind or family of relations.”²⁵ This is why generalizations about individuals cannot render reference to groups superfluous. To reduce all social processes and structures to the ideal type of relationships among rational individuals with fixed preferences and motivations, means leaving many properties and processes that are necessary to understand human life unthematized. Call this the irreducibility thesis: we need to study not only individuals, but also individuals in social contexts, because such contexts importantly inform individual values, interests and actions.²⁶ What does this mean?

3.2 THE GROUP STRUCTURE

Much depends on the way we perceive a group. Groups can be of different types. People come together in a multitude of ways and for diverse purposes. It is possible to distinguish between random collectives, groups created through voluntary association, and those that are—from the perspective of their members—simply given, as collectives belonging to which is normally not a matter of a person’s choice.²⁷ The following discussion focuses on the latter type, and in particular to intergenerational social groups (nations, cultural groups, citizenry of a state). I understand such groups as collectives with a distinct identity, whose members are connected by multiple bonds: tradition, shared values, cultural norms, solidarity, interests, and formal norms and institutional arrangements.

The discussion begins with the question of the ontological status of groups. Are groups (or at least some of them) agents that exist in their own right, independently of their members? Two avenues are open. The first position argues that certain collectives are autonomous agents. Differences within this position reflect the choice of the criteria for collective

²⁵ *Ibid.*, 36.

²⁶ May, 3.

²⁷ See e.g. Janos Kis, “Beyond the Nation State,” *Social Research*, Vol. 63, No.1, 1995, 221.

agency. Following analogy with the individual agency, most authors argue that the criterion should be the capacity for intention.²⁸ In addition, group solidarity,²⁹ the capacity for second-order reflection,³⁰ joint commitments,³¹ or existence of institutional agency personifying a group,³² are also analyzed as possible bases for autonomous collective agency.

The second position also affirms the indispensability of the analysis of groups, by claiming that groups are different from individuals who compose them. But this does not entail the claim of collective agency. I side with this view, and I will use it in the analysis of collective responsibility. The following short elaboration is importantly influenced by Larry May's account on the nature of social groups. May builds his position on two claims: (1) social groups do not exist as independent agents, but (2) individual group members are often incomprehensible as acting alone. Groups are thus best conceptualized as individuals in relationships.³³ These relationships can be of different scope and kind: incidental interactions in random collectives, those shaped by family ties, informal relationships of friendship, relationships formed by common interest or shared world-views, those defined by formal organizational norms (e.g. firms, or universities), or the relationships created by belonging to large voluntary (e.g. mass movements) or nonvoluntary (e.g. ethnic) groups, or political communities (states).

Internal group relations change the capacities of individuals, enabling them "to act in ways they could not act otherwise."³⁴ May explains this strengthening of the capacity to act by referring to *the group structure*. Groups are not mere aggregates of individual relationships. These relationships are better seen as features of the comprehensive group structure: "The structure of the social group is the set of relationships that exist

²⁸ Michael Bratman, *Faces of Intention. Selected Essays on Intention and Agency* (Cambridge: Cambridge University Press, 1999), 109.

²⁹ See e.g. Joel Feinberg, "Collective Responsibility," in Larry May and Stacey Hoffman (eds.), *Collective Responsibility. Five Decades of Debate in Theoretical and Applied Ethics* (Lanham: Rowman and Littlefield, 1991), 62.

³⁰ Kay Mathiesen, "We're All in This Together: Responsibility of Collective Agents and Their Members," in Peter French and Howard Wettstein (eds.), *Shared Intentions and Collective Responsibility* (Malden: Blackwell Publishers, 2006), 243.

³¹ Margaret Gilbert, "Who's to Blame? Collective Moral Responsibility and its Implications for Group Members," *Midwest Studies in Philosophy*, XXX, 2006, 98.

³² Chadrane Kukathas, "Responsibility for Past Injustice: How to Shift the Burden," *Politics, Philosophy & Economics*, Vol. 2, No. 2, 2003, 181.

³³ May, 9.

³⁴ *Ibid.*, 17.

among the group's members."³⁵ Expanding May's definition slightly, the group structure could be understood as the *stabilized interplay of different relationships among the group's members*. Ways of structuring relationships range from formal legal identification of groups as organizations, to substantive identification of groups as intergenerational entities. Following May, I will argue that the group structure makes a difference that has to be considered in the exploration of responsibility.³⁶

Again, what does it mean to say that the relevance of such groups should be distinguished from the strictly individual perspective of their members, especially if the concept of the autonomous collective agency is rejected?

We can start by asking why individuals join their capacities and act in concert. One possible approach would argue that individuals unite when they identify a shared goal, which then serves as the basis of their collective intention to act towards producing a desired outcome. Indeed, there are such groups. If my friends and I form a rock and roll band, we will define a common goal—be it making great music, or making money—and we will work towards its achievement. If I enter university, I will accept its existing institutional constraints as legitimate guidelines designed to help me to achieve my goal of getting an education and obtaining a diploma. In the first case, creation of a new group is made possible thanks to the overlapping goals of persons who agree to be members. In the latter, I join an institutionalized group because it provides me with the environment in which I can fulfill my goals. But this characterization does not do for groups I explore, because the persons composing them are non-voluntarily held together by bonds that are both historical and normative. We do not decide to form or join such groups—rather, we face the task of making sense of our already given membership in a historically shaped collective that rests on strong normative requirements and constraints. Only when we identify these normative ties, will we be able to properly conceptualize shared goals, collective intentions and actions.

3.3 SOLIDARITY THROUGH TIME

According to Larry May, the normative basis of intergenerational nonvoluntary groups is provided by solidarity:

³⁵ *Ibid.*, 3.

³⁶ Larry May, *The Socially Responsive Self. Social Theory and Professional Ethics* (Chicago: University of Chicago Press, 1996), 92.

It is the solidarity relationship between each member and each other member that indicates that there was more going on than the actions of single solitary individuals... Solidarity seems to be the kind of relationship which could turn a collection of individuals into a group which can act in a somewhat organized fashion.³⁷

Solidarity can be first identified as an attitude of sentiment, a feeling of closeness to other group members, which can take different forms, including an active interest in the well-being of the significant others, and in the well-being of the group as a whole.³⁸ This attitude further extends into a particular ethics of care, where one's own good becomes to an important extent inseparable from the good of fellow group members—special, group-specific duties follow.³⁹ Thus understood, solidarity is the source of two important features of the group structure: the common good and common interests.⁴⁰ The assumption is that this is where incentives for collective intention and action are derived from. These two categories require further elucidation: how and by whom are the common good and common interests identified, established, recognized, protected, and realized? Is their commonality genuine? Do they include individual interests and ideas of the good, and if so how? These questions inform us that in examining the group structure we cannot simply assume the practice of solidarity. We need to know about the ways of its coming into being.

To start with, the existence of groups I explore is independent of individuals who at a given moment compose their membership. We do not identify a nation, a race, or citizenry of a state, on the basis of the presence

³⁷ L. May, *Morality...*, 36.

³⁸ I do not argue that solidarity is exclusive to the intergenerational non-voluntary groups—the claim is only that solidarity is the focal point of such groups. For instance, institutionalized groups like organizations are distinguished by their organizational structure, legally formalized duties and decision-making procedures. Solidarity can be an important feature of such groups, but it is not their defining feature.

³⁹ “The members of a group must by and large hold certain attitudes about the responsibilities they owe one another if these responsibilities are to count as genuine fraternal obligations. First, they must regard group's obligations as special, holding distinctly within the group [...] Second, they must accept that these relationships are personal: that they run directly from each member to each other member, not just to the group as a whole in some collective sense [...] Third, members must see these responsibilities as flowing from a more general responsibility each has of concern for the well-being of others in the group [...] Fourth, members must suppose that the group's practices show not only concern but an equal concern for all members” – Ronald Dworkin, *Law's Empire* (London: Fontana Press, 1986), 199–200.

⁴⁰ See e.g. William Rehg, “Solidarity and the Common Good: An Analytical Framework,” *Journal of Social Philosophy*, Vol. 38, No. 1, 2007, 7.

or absence of any of its particular members. While members come and go, such groups persist. Given that this is also true of voluntary groups classified as organizations (e.g. corporations, or universities), we need to ask about the criteria of this independence. Member-independence of formalized voluntary groups is based on their decision-making institutions and rules. For nations and similar large nonvoluntary groups, the criterion is their intergenerational quality—such groups exist along a time-span much longer than an individual's lifetime. Obviously, not only the membership changes—the group also changes as time passes, and some of its important features undergo transformation. Still, there remains an essential sameness of the group, which we recognize by referring to its *identity*. The minimum condition of the existence of the group identity is the continuous readiness of ever-changing individuals to see themselves as group members.

Why are they ready to do so? Here we need to note that, although groups are existentially independent of particular members, the fundamental features of the group structure still pertain to concrete individuals. These features are structured as the special relationships and requirements that shape the framework of individual identity. Some of them we can expect to find accepted by members as their own (sense of the group belonging, recognition of the group-specific values as one's own values), while some others are specifically attached to groups (rules and institutions). In the former case the individuals affirm their attachment by *interiorizing* group features, while in the latter they do so by *accepting* group features as a legitimate framework of their lives. Both types of group features are shared by the individuals who, at a given moment, compose the group. No social group can exist without this *I–we* interplay, but it is important to reiterate that these relational features are not exclusive either to the present moment, or to persons living now. When we say that our life together is defined, among other things, by the sense of belonging and by the shared meanings, we refer to practices, beliefs, attitudes, values, institutions, and norms that are relevant today, but that often have their origins in the past.⁴¹

It would be wrong to disregard the past as irrelevant, given that we do not live in a mechanically delineated here and now. But it would be equally wrong to see the past as a simple given, the main features of which would be found already transferred and shaped, waiting for us as a valid framework of our lives. Intergenerational identity is not simply an-

⁴¹ Edward Shills, *Tradition* (London: Faber & Faber, 1981), 12.

chored in the past. It lives through continuous processes of reflection and interpretation undertaken by successive generations. Our view of the past is always a present-day view. Generations do not necessarily share the content of values, attitudes, or norms: today we do not do things in the way our forebears did, nor do we evaluate the world in the same way they did. What are traded are only certain communicative patterns for values, behavior and judgment. These patterns are informed by a complex reflective position. First, our current collective identity is to an important extent specified by the history of our group, which is the history of the way of life of the individuals who had belonged to our group before we were born. Second, we try to provide the best contemporary interpretation of their practices, values and rules. Third, the best interpretation consists in the continuous reconstruction, evaluation and affirmation of those identity patterns that we today find valuable, or good for us, and, at the same time, right in the universal moral perspective.

So, it might be obvious that a common life in a large intergenerational social group is not possible without a shared normative framework, which consists of a set of rules, values, institutional forms and behavioral patterns. It is equally obvious that this set cannot be created anew with each generation. In the processes of socialization, members of a social group accept a set of inherited points of orientation as “cultural forms of life in which they have developed their identity [...] even if they have become disengaged from the traditions of their origins.”⁴² The meaning of these points of orientation, or of our shared culture, becomes accessible to us only through reflection.⁴³ The capacity for, and practice of reflection in the social context are at the core of the very possibility of both individual autonomy and group solidarity. If this holds good, solidarity cannot rest on the simple assumption that group identity and its normative framework

⁴² Jürgen Habermas, “Struggles for Recognition in the Democratic Constitutional State,” in Amy Gutmann (ed.), *Multiculturalism. Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994), 126.

⁴³ This is not to deny that many people often accept their belonging to the group in an unreflected manner, which then leads to the uncritical acceptance of the group’s culture as well: belonging becomes good in itself, group values are simply assumed as individual values, dominant attitudes and beliefs are seldom questioned, actions done in the name of the collective are accepted as legitimate regardless of their goals, intentions, or outcomes. If this kind of passivity were affirmed as a dominant individual condition in society, it would ultimately lead to denial of individual autonomy, while at the social and communal level the consequence would be either anomie or an oppressive political form legitimized with ideological reference to the collective good, or both.

are self-comprehensibly good: “Solidarity, unlike group identification, requires a level of social and political consciousness.”⁴⁴

Seen in this way, solidarity is more than an emotional attitude: it becomes a *normative* feature of membership.⁴⁵ It does produce non-voluntary duties for all group members, but—perhaps contrary to our intuitions—such duties do not assume an unquestionable loyalty to our group, a categorical support for the prevailing interpretation of its ethics, its institutional arrangements, or our group-specific practices. Solidarity is a task. As a reflective feature of the common life, it requires all of us to engage in the best interpretation of the collective intentions and actions carried out in the name of the group. Importantly, solidarity thus understood may in some contexts call for members to *disassociate* themselves from the group’s undertakings, or from normative interpretations endorsed by the majority. I will return to this in Section Four.

3.4 COLLECTIVE ACTION: RELATIONAL AND POSITIONAL

Seen in this way, solidarity makes it possible to proceed towards the conceptualization of collective intentional action without succumbing to the notion of autonomous collective agency:

The limited ascription of collective intention is justified when individuals are related to each other in such a way that they come to have purposes and goals which are different from the purposes and goals they would have had on their own... The structure of the group provides a common basis for goal-oriented activity. Insofar as the goals and purposes are group-based, it makes sense to ascribe limited collective intent to the social groups.⁴⁶

Individuals act collectively when they intentionally do their parts of what they conceive as a collective project, and when their conceptions of that group action overlap sufficiently. When these minimal conditions obtain, we can ascribe actions both to a group and the members of that group. Collectively acting agents render themselves the authors of their group actions.⁴⁷

⁴⁴ Howard McGarry, “Morality and Collective Liability,” in May and Hoffman (eds.), 1991: 81.

⁴⁵ Paul Sheehy, “Holding Them Responsible,” in French and Wettstein (eds.), 2006: 87: “The members together—as a group—ought to stand effectively to the world in a certain way for the common reason that such an emotional response is demanded by the nature of the deeds of the group.”

⁴⁶ L. May, *Morality...*, 67.

⁴⁷ Kutz 2000: 138.

It does not, however, follow that collective intention and action do not exist unless all members share an intention and participate in an action. We do not recognize an intention as collective on the basis of its being identifiable as each member's intention, but on the basis of its rootedness in the character of the group relations and its non-reducibility to individual intentions. An intentional action can be interpreted as a collective one when it flows from the nature of the group-specific interdependence, when it is accepted as legitimate by the majority of members, and when those who on reflection reject it, do so *because* they are members.

It follows that the collective action may contain important normative elements. Solidarity and group ethics demand that each of us reflects on our participation in a joint intentional action, and that we all ask whether the action and our part in it are justifiable. This leads to the question of the morality of groups in general, and the morality of the intentional collective action in particular. If we can agree that there can be collective action beyond independent group agency, we need to ask whether it is possible to extend this view, and discuss collective action in moral terms. I would like to defend an affirmative answer to this question. If the collective action—in terms of understanding its goals, intentions, processes, and outcomes—is not reducible to the members' actions, the same holds good for the moral quality of such an action. The claim is not that the group is a moral agent, but rather that the morality relevant for the collective action is essentially relational and positional.⁴⁸ The relational aspect shows that each social group has its normative standards of behavior, as a set of values and principles that inform members about the valid conceptions of the good, right and just, which guide both the individual member's conduct and interpersonal relationships. Here I will just note something to which I will return below: these standards of behavior combine group-specific ethics and universal moral standards. The moral basis of our commonality brings together values that belong only to us in the group, and values we share with all human beings, regardless of their special identity and group affiliation.

[These standards] ...can be interpreted not merely as guides to conduct, but as constitutive of a particular form of relationship... These very general moral standards define what might be thought of as a default relationship between any two members of moral community, a relationship typically structured by a principle of equal respect and possibly equal concern. I bear such a relationship to any other person by virtue of our common humanity [...] Thus, moral standards are defined by their role in structuring moral relationships. In most contexts, this background relationship grounds only

⁴⁸ Kutz 2000: 26–32.

minimally acceptable standards, which are then overlaid by those standards constitutive of the more particular relationships.⁴⁹

Morality of both individual and collective actions is judged against the background of this combination of universal and group-specific standards of behavior. In setting a goal and acting towards its achievement, we are duty-bound to respect these complex normative coordinates of the group relationships. In short, respecting such standards is the basis for judgment of moral responsibility.

An additional quality of morality of collective action, important for the further analysis, is its positionality. First, we always act within the concrete social context—even when we undertake an action with the aim of affirming universal moral laws, we do this from our specific position. Second, a morally relevant collective action can affect normative standards in a manner that changes the moral landscape, thus putting members of the group in a different moral relationship as compared to the one that existed before the action. Members will have to respond to their new position by finding out what happened to their normative standards in consequence of the action, and by re-assessing their duties.⁵⁰

4 Collective Moral Responsibility

4.1 THE QUESTION

In the preceding section I argued that some intentions, actions and their outcomes cannot be conceptualized in individualist terms. To understand many of the important things that happen in the social world, we need concepts of groups, relationships, collective intention and action. This holds good for bad things as well.

We live in a morally flawed world, one full of regrets and reproaches. Some of the things we regret, or for which we are reproached, we bring about intentionally and on our own. But our lives are increasingly complicated by regrettable things brought about through our associations with other people or with the social, economic and political institutions in which we live our lives. Try as we might to live well, we find ourselves connected to harms and wrongs, albeit by relations that fall outside the paradigm of individual wrongdoing...⁵¹

One important feature of the complexity of life in the society is the possibility of our connectedness to intentions and actions of which we are not

⁴⁹ *Ibid.*, 30–31.

⁵⁰ *Ibid.*, 32.

⁵¹ *Ibid.*, 1.

agents. Sometimes the character of internal group relations suggests the possibility of each member's responsibility for the acts committed by other members. Is this way of holding someone responsible justifiable? If yes, is this a special case of individual responsibility? Or, does the lack of direct contribution to an action signal the presence of collective responsibility? Departing from the definitions of the populist criminal regime and collective crime offered in Chapter One, I am especially interested in the position of those members of a post-criminal society who cannot be morally blamed for atrocities committed in the recent past. Could we perhaps identify one set of conditions the fulfilling of which would lead to the conclusion that either a group as a whole, or each member of a group, should be held responsible for everything the criminal regime has done in the name of the group?⁵² Can there be collective moral responsibility, and especially, can it exist beyond causal contribution and blame? My goal in the rest of this chapter is to offer arguments in defense of affirmative answers to these questions. Such an ambition is controversial, not least because in some important respects it challenges the standard idea of responsibility. Both intention and action are missing. Actually, this sub-group is identified as a sub-group by the morally right attitude (or lack of the morally wrong one) of its members to the criminal regime and collective crime. To prove that it makes sense to apply collective moral responsibility to these people, I will have to revisit the relational and positional features of responsibility in particular criminal and post-criminal contexts. But the first question is whether collective moral responsibility is a defensible idea at all.

4.2 RESPONSIBLE AGENCY AND THE AUTONOMY OBJECTION.

CAN THE IDEA OF EXTENDED PARTICIPATION PROVIDE AN ANSWER?

How to make sense of collective moral responsibility? I begin this section by presenting in a nutshell, the two most influential approaches to the idea. Next, I summarize a powerful individualistic objection against it. In the third step, two possible ways of defending collective responsibility against the individualistic objection are analyzed. Finally, I will hint at my main argument, which will be developed in the following section: a proper conceptualization of moral responsibility for collective crime requires that we abandon exclusive reliance on the criteria of participation and moral blameworthiness.

⁵² Juha Raikka, "On Disassociating Oneself from Collective Responsibility," *Social Theory and Practice*, Vol. 23, No.1, 1997, 93.

One influential interpretation takes collective responsibility in a substantive, or strong sense (“collectivist view”). According to this approach, groups as agents in their own right are accountable for collective actions.⁵³ This is sometimes presented as the case of “real” collective responsibility, since the link between a group, collective action, and accountability is direct: the group is the agent, collective action is the group’s action, and collective responsibility applies to the group. The second definition refers to joint, or shared responsibility (“individualist view”), where typically all members of a group are individually responsible for a collective action and its outcome: “On this view collective entities, for example, social groups and organizations, have collective moral responsibility only in the sense that the individual human persons who constitute such entities have individual moral responsibility, either individually or jointly; collective entities as such do not have moral responsibility.”⁵⁴ This approach is rejected by the proponents of the substantive account, with the argument that it provides only for a sum of individual accountabilities.

Both approaches are attacked from the standpoint of normative individualism. Reflecting on responsibility for the Nazi crimes, H.D. Lewis famously argued that collective responsibility violates the core idea of the individual moral agency, of which responsibility is one feature. Responsibility “means simply to be a moral agent and this means to be an agent capable of acting rightly or wrongly in the sense in which such conduct is immediately morally good or morally bad.”⁵⁵ It is true that our social conditions matter. Sometimes they matter as severe constraints on the individual capacity to act in a morally right way, implicating us in wrongs others have committed. But nothing of this can change one’s autonomous moral value and the corresponding idea of exclusively individual accountability, for no

⁵³ “According to philosophers of a collectivist persuasion, a central, if not the central, notion of collective moral responsibility is moral responsibility assigned to a collective as a single entity. In their view “collective responsibility” should be understood in the sense of a collective’s responsibility. Whether the members of a collective, the people who constitute the collective in question, are individually responsible is a separate question. When it comes to collective moral responsibility, the collective itself is the bearer of moral responsibility. An important corollary of the collectivist view is that collectives are capable of bearing moral responsibility for actions and/or outcomes, even if none of their members is in any degree individually morally responsible for those actions and/or outcomes.” – Peka Makela, “Collective Agents and Moral Responsibility,” *Journal of Social Philosophy*, Vol. 38, No. 3, 2007, 456.

⁵⁴ Seumas Miller, “Collective Moral Responsibility: An Individualist Account,” in French and Wettstein (eds.), 176.

⁵⁵ H.D. Lewis, “Collective Responsibility (A Critique),” in May and Hoffman (eds.), 25.

external circumstances are of moral relevance for a free person's capacity to reason morally. Thus, fairness requires that the question of accountability is seen in relation "not to some abstract entity in which he and all other individuals are merged, but to what we could reasonably estimate could have been expected of the individual, who is the sole bearer of guilt and merit, in the particular situation confronting him."⁵⁶ In short, someone who did not take part in crime, who did not support it, who cannot be blamed even for inactivity, someone who did nothing legally punishable and morally wrong, cannot be morally responsible. Responsibility for a committed act is always an individualizable causal relationship. This is so because retrospective responsibility is ultimately about moral blameworthiness, which results from a morally faulty decision that only an individual can make.

The normative individualist critique poses a serious challenge to those who defend collective responsibility. If its arguments are proven accurate, it would follow that collective responsibility is both logically incoherent and inherently unfair, leading to morally unjustifiable inferences. We first identify a social group; then we note that some of its members, often acting as self-styled group representatives, committed crime; next, we blame the group as a whole, to end up with assigning blame to each and every individual who belongs to the group, regardless of his or her attitude and causal relationship to crime.

Most of the proponents of collective responsibility see this as a legitimate objection. In response, they try to re-conceptualize the causal link between the collective action and the group membership. The goal is to redefine participation in order to extend the scope of collective action and its agency. This would make it possible to causally link with crime those group members who are neither criminally nor politically responsible, but who were still in different ways supportive of the regime and its criminal practices. This is seen as a requirement of justice:

Holding agents morally accountable on the basis of what others have done fails to respond to those agents as distinct persons, with their own characteristics, decisions, and commitments. Just systems of moral accountability serve the purpose of relating agents harmoniously to one another, and protecting the interests that make their lives good. Ignoring individual differences among agents undermines these purposes, for the resulting responses to accountability do not attach to agents in such a way that they can be integrated into an understanding of their position with respect to their victims or bystanders. The relationships that systems of accountability are supposed to foster (and, in part, constitute) instead are sapped by indiscriminating approach.⁵⁷

⁵⁶ *Ibid.*, 29.

⁵⁷ Kutz, 115.

According to Christopher Kutz, the way of overcoming the predicament posed by normative individualism consists in conceptualizing *inclusive* collective action: “I am the exclusive author of the actions I perform myself, as well as of the events caused by those actions. By contrast, I am the inclusive author of the actions of the group in which I participate—inclusive because I am one among those who can truly say *we* did it.”⁵⁸ In defining the criterion of inclusion in collective action, Kutz argues that the agent’s involvement does not have to include a direct causally identifiable contribution to the jointly intended outcome. *Participatory intention* will do for what Kutz calls “the minimalist conception of collective action”: “An agent’s acts can be nonaccidentally related as means to end, and the agent can intend that that relation obtain, without intending that the end (or group act) is realized.”⁵⁹ In other words, a contribution of each individual agent remains the feature of the collective action, but causality is disassociated from intending (or contributing to) a particular outcome. For an individual causal contribution to exist, it suffices to take the form of the approval of a particular interpretation of the group-specific ethics. As an ethnic Serbian, I may hold that Albanians in Serbia do not deserve the treatment of equal citizens; I express my position by arguing that Albanians are not loyal to the Serbian state and that therefore they should be deprived of some political rights; I support the state policies that discriminate against this group. But, these views do not lead me to thinking that killing these people would be justified. However, when the state terror against Albanians culminates in regime-sponsored murder, I will be accountable for complicity in atrocity. My responsibility follows from my support for the ruling ethical stance that provided legitimacy for the criminal regime and its practices. I am then legitimately considered a participant in the collective criminal action, and I share collective responsibility for it.

Larry May tries to elucidate the causal link between group membership and harmful collective action by developing a “social-existential” account of collective responsibility. His question is “what is it about the fact that one is a *member* of a group which is causally responsible for a major harm, that morally taints the members?”⁶⁰ May starts by acknowledging

⁵⁸ *Ibid.*, 139.

⁵⁹ *Ibid.*, 101–102.

⁶⁰ L. May, “Metaphysical Guilt and Moral Taint,” in Larry May and Stacey Hoffman (eds.), *Collective Responsibility. Five Decades of Debate in Theoretical and Applied Ethics* (Lanham: Rowman and Littlefield, 1991), 244.

Karl Jaspers' contribution to the debate. Himself an existentialist, Jaspers develops the idea of metaphysical guilt, "based on who one is and not on what one had done."⁶¹ Metaphysical guilt is for Jaspers a simple inference of the fact that each person's individual identity is a relational category, pointing to everyone's irreducible moral connectedness to our shared humanity. It follows: "There exists solidarity among men as human beings that makes each co-responsible for every wrong and every injustice in the world, especially for crimes committed in his presence or with his knowledge."⁶² Metaphysical guilt, as a type of accountability independent of my attitude, intention, or participation, does not arise out of my violation of any moral norm: it is simply the feature of my existence in the world. In other words, given that it does not rest on a distinction between right and wrong that would specifically point to me, it does not imply moral responsibility.

May disagrees with this feature of Jaspers' theory. Being universalistic in the way outlined above, metaphysical guilt eventually rests on the claim that everybody is responsible for everything, simply by virtue of being human. Still, May finds Jaspers' project worth refining into a different version of existentialism. Reference to *social existentialism* points to "the importance of social groups in the formation of the self and in understanding the limits of our moral responsibilities."⁶³ Groups have shared identity, of which solidarity is the central feature. Our personal values undergo transformation in result of the group belonging—social identification structures our self-perception in certain important ways; our individual identities are socially mediated categories.⁶⁴ It follows that membership in a community creates increased requirements of responsibility. This community-specific responsibility is both assumptive and retrospective. In assumptive terms, we bear co-responsibility for the well-being of our community and each of its members. Most importantly, we are co-responsible for the practical affirmation of legitimate standards shaping our group morality; the criterion of the

⁶¹ Ibid., 239. May's reference is to the well-known Jaspers' book *Die Schuldfrage*, the English edition of which is (somewhat confusingly) titled *The Question of German Guilt* (New York: Capricorn Books, 1961).

⁶² Jaspers, 36.

⁶³ May, "Metaphysical Guilt..." 253 at note 3.

⁶⁴ "Most important, cultures are both products of individual action and attitude, and also the producers of new actions and attitudes in the world. New attitudes that arise within a culture are often very different from attitudes that would arise among individuals who do not share a common culture." – *Ibid.*, 246.

legitimacy of our moral standards is harmony of the group-specific ethics with the requirements of universal morality.

How does this relational quality of assumptive responsibility affect responsibility for the collective action? In particular, what does retrospective community-specific responsibility mean in the case of mass crimes? We cannot choose our ethnic or racial identity; many among us were not capable of preventing or stopping criminal actions; at least some of us were not supportive of criminal goals and intentions, nor of its justifications. Then how to explain and justify thinking in terms of collective moral responsibility? And, if the concept can be defended, how to define its justifiable reach? Recall that it is not unusual for the causally innocent group members to feel guilty for harms committed in the name of the group. This is typically referred to as vicarious moral shame. Hannah Arendt saw both this attitude and the way it is referred to as signs of moral confusion, and her analytical clarification insists on the distinction between political and personal responsibility.⁶⁵ For her, political responsibility is a vicarious shared (and intergenerational) responsibility that applies to all members of the political community, simply by virtue of their membership. On the other hand, personal responsibility—legal or moral—applies only to our actions.

It would follow that my feeling of shame for crimes committed in the name of the Serbian nation perhaps tells about me as a decent person, but it does not imply either my individual accountability or my inclusion in collective moral responsibility. Still, May disagrees with this interpretation. He argues that the moral questions related to our membership can never be vicarious for us. First, the membership is morally relevant. Second, as group members, we never find ourselves simply saddled by what was done in our name. Accordingly, no morally relevant collective action can ever leave a member unaffected—we are all implicated in the deeds done in our name. This position seems to expose the theory to the individualist objection of unfairness. May concedes that the objection is serious, and he responds by reconceptualizing participation and control in light of the moral relevance of membership. While one cannot be responsible for one's membership in a non-voluntary group, "what is under one's

⁶⁵ Hannah Arendt, "Personal Responsibility Under Dictatorship," in Hannah Arendt, *Responsibility and Judgment*, ed. by Jerome Kohn (New York: Schocken Books, 2003), 27–29; Hannah Arendt, "Collective Responsibility," *op. cit.*, 149–151; "Organized Guilt and Universal Responsibility," in Hannah Arendt, *Essays in Understanding 1930–1954*, ed. by Jerome Kohn (New York: Harcourt Brace, 1994), 125–127.

control and hence the subject of appropriate feelings of responsibility, is how one positions oneself in terms of that group.”⁶⁶ The next important explanatory step consists in offering a carefully nuanced exposition of the question of choice. In a nutshell, the claim is that no person confronted with the question of how to act is ever deprived of choice. Transferred to the level of the group structure, the claim goes like this: in concrete situations we can, and ought to decide how to respond to the concrete challenges our membership imposes. If the crime is committed in the name of a nation, all its members are duty-bound to take a morally adequate stance towards the intention, the action, and the outcome.⁶⁷ If we fail to do so, holding us responsible will be a justified inference.

Now, think about a multitude of possible real-life situations of duress that any person in a populist criminal regime faces. How can anyone who knows about the history of these extreme constraints claim that a decent person in such a situation had a choice, and that the failure to choose makes him or her morally co-responsible? May agrees that an individual member cannot prevent organized, majority supported, collective harm; hence, it would be inappropriate to hold that person responsible for the failure to act. He proceeds by challenging the standard notion of decency, where one is accountable for one’s own freely chosen intentional actions. Recall that groups make us capable of doing things we could not do on our own—an extended notion of the individual duties (assumptive responsibility) follows, which in turn broadens the notion of our participation and the range of the intentional actions for which we are retrospectively accountable. May calls this a “duty of authenticity”:

Authenticity involves, among other things, being conscious of who one is and taking responsibility for the harms of one’s class, one’s position and one’s situation in the world. To be “inauthentic” is to “deny” or “attempt to escape from” one’s condition, to fail to assume responsibility for choosing to be who one is.⁶⁸

Although there are metaphysical features to the idea of authenticity, it is still a moral concept, thanks to the core duty to make a morally right choice in any situation one is confronted with. This duty is in the focus of our extended individual responsibilities. We are existentially conditioned persons, who each for themselves and together with others, ask about “the

⁶⁶ May, “Metaphysical Guilt...”, 245.

⁶⁷ Larry May, *Sharing Responsibility* (Chicago: The University of Chicago Press, 1992), 148.

⁶⁸ May, “Metaphysical Guilt...”, 242.

vision of our place in the world.”⁶⁹ In its membership-specific aspect, the duty of authenticity is shaped by an interplay of shared attitudes, solidarity, and the shared identity. This interplay provides the roadmap for thinking about responsibility for a collective crime. We should not start from the action itself. The duty to respond unfolds already at the stage of forming the attitudes. The assumption is that the mass crime was preceded by a socialization process centered on wrong attitudes, which created an overall diminished sensitivity to injustice.⁷⁰ Such attitudes are more than individual states of mind—through the processes of socialization, they become the features of our shared identity, which decisively inform the identification of harmful collective goals, formation of collective criminal intentions, and the realization of collective criminal action. If such attitudes indeed form the basis of group solidarity, and provide for the ultimate justificatory perspective of collective actions, we have the basis for shared responsibility. If a collective action relies on the dominant attitudes, or if its agents claim to act in the name of all, solidarity demands reflection from each member. This should be the case, because we contribute to each other’s attitudes, including the wrong ones. On a larger scale, we are co-authors of our shared identity, including its blameworthy features and inferences:

People in communities share more than a sense of accomplishments within the group, they also share a sense of the failures. This is what generates the sense of responsibility that members of a community feel for the harms in which their communities participate.⁷¹

It follows that I cannot avoid moral responsibility by arguing that I did nothing wrong, or by proving that I did not participate in the formation of, nor did I endorse, the harmful attitudes. To the extent to which shared cultural identity and solidarity can never be removed from the picture, such attitudes are not alien to me, and the duty of authenticity requires that I oppose them: “When we do not show disapproval of the harmful actions of other identity group members, we allow those members to define our group, and by extension, us.”⁷² Those who contributed nothing—attitude, intention, or action—to the crime, and who could not have done anything to change the course of events, will still be morally responsible for omission. Omission is a case of remote, indirect participation, because it points to the person’s failure to live up to the duty of authenticity. It consists in

⁶⁹ May, *Sharing Responsibility*, 2.

⁷⁰ May, *Sharing Responsibility*, 62.

⁷¹ May, “Metaphysical Guilt...,” 246–247.

⁷² Cassie Striblen, “Guilt, Shame, and Shared Responsibility,” *Journal of Social Philosophy*, Vol. 38, No. 3, 2007, 477.

neglecting to distance oneself from the harm, either by disavowing atrocities, or by disassociating oneself from the group: “By condemning and disavowing what one’s community has done, one changes that part of one’s self which is based on how one chooses to regard oneself. Such changes disassociate oneself from one’s fellow group and diminish one’s shared responsibility for what others have done.”⁷³

While sufficient for establishing the person’s non-vicarious responsibility, this type of participation is so indirect that it renders the sanction of moral blame inappropriate. The subject of judgment is not our directly observable, causally explicit behavior, but rather our existentially perceived individual identity: by omitting to explicate my dissent, I become inauthentic. This calls for moral sanction because we are assumptively responsible for everything our group does, and when bad things are done in our name, the only way to change the “chain of responsibility” consists in breaking the ties with one’s group.⁷⁴ The sanction that applies to those who choose to remain group members is *moral taint*.⁷⁵ Not being blameworthy, I am still marked by the association I chose not to break.

May’s discussion of collective responsibility provides for an immensely rich and sophisticated contribution, and in the discussion that follows I will proceed by relying on his concepts of the group structure and solidarity; I will also keep his distinction between blame and taint. However, I believe that it is possible to extend collective moral responsibility beyond the causal link between the group membership and crime. When May claims that doing anything to prevent crime was not a realistic option under the Nazi regime, but that distancing oneself from criminal attitudes was still a matter of choice, he draws a sharp distinction between two kinds of action which may have been equally implausible in a totalitarian criminal context: disassociation from crime is not less risky for a person than an active attempt to prevent it. Both demand acts of heroics, and this is why I believe that none of them applies as the benchmark of accountability.

I agree with Kutz and May that no effort to preserve the causal, participation-based connection between collective crime and *each* member of the group can ever succeed.⁷⁶ This simple claim relies on the empiri-

⁷³ May, “Metaphysical Guilt...,” 248.

⁷⁴ *Ibid.*, 247.

⁷⁵ *Ibid.*

⁷⁶ Of course, both Larry May and Christopher Kutz share this insight, but they insist that the reach of collective responsibility extends to the borders identified by the properly understood causality.

cal knowledge provided by the universe of cases. In all groups tainted by atrocities committed in their name, we find people who—judged by their beliefs, attitudes, goals, intentions, or actions—are neither directly nor indirectly morally blameworthy. Normative individualism is right in pointing to the relevance of this insight, but it mistakenly argues that large-scale crime does not affect the moral status of such people. Lewis' view on the character of personal autonomy fails to account for the moral importance of internal group relationships. It is wrong to assume that in a context defined by collective crime, moral decency effectively protects a person against the deep immorality of the dominant values, goals, intentional actions and their outcomes. While a person can remain committed to the basic moral standards of right, the relationships that comprise the group structure change profoundly—they are now based on the ethics that deprives a moral agent of the possibility to act as a morally decent person. No decent person can be blamed if the character of duress deprived him or her of the ability to act. Something else is at stake: the criminal context destroys the relational quality of morality. In consequence, a decent person cannot live a morally good life anymore.

On the other hand, while I agree with May and Kutz that group membership creates increased responsibility for each member, I do not believe that responsibility ends at the border drawn by extended notions of participation and attitude. We could ask whether the context created by collective crime makes it possible—or, indeed, necessary—to extend the idea of responsibility so that it applies to each member of the group. I want to offer an affirmative answer to this question. To hold each member morally co-responsible for collective crime would then need drawing a careful distinction among the types of group members' properties and relationships that may be legitimate reasons for moral responsibility. I will distinguish between the moral status of intentions, actions, consequences, and identity.⁷⁷ Following the claim of the essentially relational quality of responsibility, I will look at these reasons from a particular viewpoint. This viewpoint is a composite of four features: (1) the interplay between individual identity and group identity; (2) the character of crime from the perspective of group identity; (3) the way crime changes the relational and positional features of group-specific ethics; (4) the character of individual morality in the context of the last feature (3).

⁷⁷ This distinction is derived from Kutz's exploration of "three principal bases of responsibility." He distinguishes between reasons of conduct, reasons of consequence and reasons of character. See Kutz, 26–45.

In the remaining part of this section I will distinguish between two causally specific reasons (intention and action), and one identity-specific reason (group identity that precedes crime and the character of that identity after crime) for collective moral responsibility. While the first two reasons distinguish a subgroup composed of persons causally responsible for crime, the latter one provides the basis for moral responsibility of those group members who have remained morally decent. In the closing section of this chapter I will address the reason of consequence, where the argument will be that the legacies of collective crime change the relational and positional features of the group structure, in a manner that creates duties to respond.

4.3 TWO CAUSAL REASONS FOR COLLECTIVE MORAL RESPONSIBILITY

4.3.1 *Intention*

The first reason for responsibility for mass crime is intention. I can actively engage in formulating a criminal goal, influencing other people to accept it, and insisting on its realization. I may stop short of actively taking part in the collective action, but I still will be causally responsible for crime. Sometimes my contribution to shaping the collective criminal intention will be identifiable as a legally defined collaboration in crime, in which case I will be criminally responsible. Sometimes it will not qualify as crime, but my violation of basic moral norms will nevertheless be clear.⁷⁸ Let me focus on the latter case.

An example of intentional violation of moral norms is provided by the engagement of Serbian nationalist intellectuals under the Milosevic regime in the late 1980s, before the violent break-up of Yugoslavia. These intellectuals focused their efforts on promoting a distinctly populist ideology centered around the myth of national unity and supported by continuous fabrication of “enemies” against whom “we” must unite. The complex machinery of nationalist indoctrination was set in motion to produce the basis for massive ethno-political mobilization and homogenization. A suitable discourse was found in the form of resentment nationalism, an

⁷⁸ Sometimes there will be no crime at all, which points to the failure of intention. Nevertheless, my contribution to the failed collective intention remains an act of moral wrongdoing, and it would be inappropriate to dismiss it as irrelevant by claiming that my morally wrong goals are not realized—if groups are identified through a set of morally relevant relations that are based on an interplay of universal moral norms and the group-specific ethics, then criminal intention presents a case of violation of basic principles on which our internal group relationship rests.

ideology centered on the analytically meaningless but ideologically powerful image of Serbian martyrdom in Yugoslavia. Serbs were presented as the victims of a conspiracy, inspired, carefully planned, and carried out by the coalition of their traditional enemies (other Yugoslav nations). This chauvinistic image of the victimized innocent nation was *presented as reality, in order to produce a new reality*. Imposing the false image of collective identity started with the creation of passions, fears and fake mythical memories. The ideology was then used to release this attitude to “others” from civilizational constraints, to be shaped into a prevailing feeling of hatred, and finally to justify an aggressive war and the mass murder of innocent people.

On the eve of Yugoslav wars in the 1990s, one Serbian poet wrote that “Serbs, even when they are killing, are only fulfilling their covenant with God.” A Serbian film director exclaimed: “Long live death!”⁷⁹ Perhaps none of them thought of the actual murder of innocent people. But in the social context, their personal preferences and goals can be understood only as concrete contributions to a particular collective intention, which made the ensuing action possible. We cannot apply a “law of diminishing contribution” here, to claim that the collective intention would anyway have been formed without an individual agent playing a part. The relative weight of my contribution to the collective intention does not count. If my personal goal provides a contribution, however small, to the shared goal, then I should be judged from the perspective of the collective intention formed on the basis of that goal. My contribution to the Serbian collective crime may have consisted of only one diatribe against Croats delivered at a poorly attended political meeting in a provincial town. Still, a comparison of its weight with the weight of the victorious collective intentions of Serbian aggressive nationalism does not confirm the relative insignificance of my involvement. Rather, it reveals the harmony between individual and collective perspectives, where collective intention is the embodiment of converging individual goals. A look at the individual perspectives will show that this harmony is in some cases a matter of knowledge. An extreme nationalist may be devoted to the realization of his views; he understands that his personal attitudes to the “others” are of no practical currency as long as he does not join forces with like-minded others, to form a collective goal and fitting intention. Knowing that he alone cannot

⁷⁹ Nenad Dimitrijevic, “Words and Death. Serbian Nationalist Intellectuals 1986–1991,” in Andras Bozoki (ed.), *Intellectuals and Politics in Central Europe* (Budapest, CEU Press, 1999), 142.

do harm to “others,” such an agent will strive to join fellow extremists, in order to make the harmful goal feasible, and to accomplish it through a collective effort. In a different situation, another extreme nationalist may fail to realize that his personal attitudes harmoniously fit the dominant collective intention. He may simply be happy to seize the opportunity and speak out his opinion about others. Still, this opinion contributes to, and fits harmoniously into the collective intention. The first agent anticipates the moral weight of his opinion in the context of the dominant intention; the second fails to do so. I see no morally relevant distinction between the two.⁸⁰ In both cases, assumptively responsible agents have voiced their attitude. Looking at it on societal and political levels, we see their attitude victorious. This victory would not have been possible without individual contributions.

This is why the weight of individual participation in the collective intention is properly judged by evaluating the collective intention itself. Again, this does not imply the sameness of all individual contributions—the argument is simply that they cannot be properly understood if the focus remains on their individual agents.

4.3.2 *Participation*

The second reason for collective responsibility is participation in collective action. Perpetrators and collaborators will be criminally responsible. Like in the case of intention, participation in a collective criminal action is not limited to acts legally defined as crimes. Many people can be held morally accountable for different types of supportive actions which, without being crimes, qualify as breaches of moral standards, which causally contribute to crime.

Take the example of the “special trains” (*Sonderzüge*) in occupied Europe during the Second World War. These trains were carrying Jews and other “less worthy” people to concentration camps. Historical research shows that deportations were technically extraordinarily complex, requiring careful planning, division of labor and coordination. A case study of the deportation of Jews from the city of Essen to the concentration camp Theresienstadt details the involvement of the following local institutions: Gestapo, regular police, municipal and regional finance offices, office for the registration of residence, labor office, office for the

⁸⁰ Of course it is easy to disagree with this position. Recall the analysis (Chapter Three) of Arneson’s, Zimmerman’s and Scarre’s treatment of moral knowledge and moral ignorance.

management of municipal flats, banks in which deportees had accounts, regional office of the German Reich Railway, the personnel of the railway station Essen-Nord, companies in which deportees were employed.⁸¹ Most of the employees of these institutions were not doing their job under extreme pressure, which—if present—would be a circumstance freeing them of moral responsibility. In addition, most of them knew what was going on, where the Jews were sent, and what awaited them there.⁸² But even if they did not know that the people were about to be killed, if they thought that deportees were sent “only” to forced labor, this ignorance would change nothing in the moral appraisal of their action: they knew that their actions were wrong. This wrongfulness appears in two forms. First, each of these actions contributed to the direct harm of depriving the agents’ co-citizens of freedom, property, and legal protection. Second, these actions were wrong independently of their outcomes, because they reshaped human relationships by violating moral equality, denying others’ autonomy, and abandoning duties of equal respect and care.⁸³

It is true that some of these individual contributions, taken separately, were neither criminal nor obviously gravely immoral. A bank clerk who blocked a Jewish person’s account just followed the technical order of his supervisor; a cleaning worker ordered to disinfect cars on their return from the camp had only to perform a routine daily duty, even if the condition of the car made it clear that some people had died there recently.⁸⁴ In other words, without many of the contributory actions these things would probably have happened in the same way, and the victims would have been killed. But, the inference made above about the status of individual intentions holds good for individual participation as well: individual actions are not neatly separable from the collective action that caused mass atrocity. This is not to say that they are indistinguishable. Collective moral

⁸¹ Michael Zimmerman, “Eine Deportation nach Theresienstadt. Zur Rolle der Banalen bei der Durchsetzung des Monströsen,” *Theresienstädter Studien und Dokumente*, 1/1994, 67–69.

⁸² For details, see the magisterial study of Raul Hilberg, *Sonderzüge nach Auschwitz* (Mainz: Dumjahn, 1981).

⁸³ “We are sometimes morally responsible for the manner in which we act towards other people, independently of the consequences of our actions.” – Kutz, 26.

⁸⁴ “After each full trip, cars are to be well cleaned, if need be fumigated, and upon completion of the program prepared for further use” – from the telegraph letter signed by certain Dr Jakobi on behalf of the General Management Directorate East of German Reich Railways, and sent to regional Reich Railway Directories; quoted after Raul Hilberg (ed.), *Documents of Destruction: Germany and Jewry 1933–1945* (Chicago: Quadrangle Books, 1971), 106.

responsibility for an action is not a category that aggregates individual contributions and treats them as equal. It is an individualist concept, in that it distributes the blame among the group members depending on the character of their involvement in collective crime. At the same time, it is a weak, non-substantive collective concept, since it does not treat the group as an agent, but it still distributes the blame among *all* group members. The manner of this distribution will be explored in more detail in the next section.

4.4 AN IDENTITY-BASED REASON FOR COLLECTIVE MORAL RESPONSIBILITY

By changing the positions of the group members, and by reshaping their relationships, collective crime creates new identities. It is possible to distinguish among victims, perpetrators, collaborators, by standers, and morally non-blameworthy members of the group in whose name harm was committed. What was done to us, what we did, or what was done in our name, is not only a feature of the factual record of our past lives. Criminal action, its justification, and consequences, form a continuum that extends into our present, informing to an important extent the answer to the question of who we are. The new moral condition requires multiple responses, reflecting the different moral attitudes and different types of causal relationships of the group members to the crime. At the same time, the requirement of responsibility applies to all group members. I will now try to explain this statement. The claim is that these newly acquired identities are the principal source of responsibility of all members of the perpetrators' group. Given the multitude of crime-specific identities, their responsibility will differ. But, none is exempted.

Before explaining this assertion, let me point to one particular property that is changed by the criminal action: the collective identity that existed before the crime, and in the name of which the crime was committed. To repeat, the question is: does the mere fact of belonging to the community in whose name the crime is committed suffice for assigning responsibility? Can we be judged for acts of others based on who we are? This is a part of a broader question: can we be judged based on who we are? An affirmative answer seems to contradict the basic idea of modernity: our communal identity is defined by moral and legal norms that do not ascribe any substantive status. Modern procedural ascription of moral and legal equality has paved the way for evaluation of individuals based on their achievement: we are what we do. Belonging is of

no moral relevance anymore. In the words of Anthony Appiah, “we no longer recognize the fact that someone was born a woman or a slave or a Jew as grounds for requiring of them different behavior (or as warranting different treatment) [...] For us, what matters is not who you are but what you try to do.”⁸⁵

The intuitive plausibility of this normative individualist position is strong. Appiah does not deny the importance of belonging, nor is he blind to the many historic cases in which certain people were subjected to grave injustices because of their group identity. His argument goes against recognizing the *moral* relevance of the group association:

Demanding respect for people as blacks and as gays requires that there are some scripts that go with being an African-American or having same-sex desires. There will be proper ways of being black and gay, there will be expectations to be met, demands will be made [...] The politics of recognition requires that one’s skin color, one’s sexual body, should be acknowledged politically in ways that make it hard to treat their skin and their sexual body as personal dimensions of the self. And personal means not secret, but not too tightly scripted.⁸⁶

If positive moral recognition of group identity is unacceptable because it denies individual moral autonomy, then it follows that no person can be held responsible for the unintended association with a harm that originates from his or her group belonging.⁸⁷ Such an ascription would violate human integrity, by imposing on the individual agent the moral requirement to respond to an action with which he or she is neither causally nor morally associated.

Appiah conceptualizes group identity mainly in terms of an external perception and recognition (or the lack of it). While a negative external perception is clearly harmful, he believes that the same holds for positive recognition. This is a reductionist view. It may be true that some groups become identifiable as distinct collectives mostly because of external prejudices. Had there not been prejudice and negative attitude against homosexuals, these people perhaps would not have developed a sense of group identity. But this is not a generally valid insight, which would apply to all types of large involuntary groups. Group identity is not only a matter of external ascription. This identity often concerns morally structured

⁸⁵ Anthony Appiah, “Racism and the Moral Pollution,” in May and Hoffman (eds.), 220.

⁸⁶ Anthony Appiah, “Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction,” in Amy Gutmann (ed.), *Multiculturalism. Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994), 163.

⁸⁷ Appiah, “Racism...,” 221.

internal relationships, which shape the individual identities of members in important ways. Larry May rightly criticizes Appiah for thinking “that what a person does or tries to do is unrelated to what that person is.”⁸⁸ To say that group belonging is morally irrelevant, amounts to an oversimplified view of modernity. One’s morality is never a matter of one’s personal convictions and choices alone. It is true that agents of thought, intention and action are always individuals, but these processes take place within the social structure. This structure is not a mere external constraint imposed on a person: the realm of morality and, within it, the realm of our opportunities, are always circumscribed by our relationships with the people with whom we live. This is why each person’s moral identity is a combination of ascribed and achieved status. “Ascribed status” does not point simply to something given to us, but rather to a quality to which we are expected to contribute and on which we are invited to reflect critically.

In the rest of this chapter my focus will be on group identity as the reason for collective responsibility.

5 Collective moral responsibility beyond Causality and Blame

I argued that groups are not autonomous agents, but that it is still proper to think in terms of the morality of collective intentions and actions. This follows from understanding a group as a structured interplay of different relationships among members. To repeat, groups are capable of acting in ways and to effects no individual could act. This faculty also includes a great capacity for inducing both good and evil.⁸⁹ A special case of collective action exists when some members of the group act, or claim to act for the whole group. Mass crime, and collective crime as one of its versions, belongs to this type of collective action. My aim is to specify the argument according to which the foundation of collective moral responsibility of morally decent people is the identity all group members share with those who are directly or indirectly causally responsible for crime. In the following analysis I advance through several mutually connected steps, which are all focused on the crime-specific relational and positional features of shared identity. I first (Section 5.1) distinguish among groups created by crime. Second (5.2), explore ideological justification of collective crime under the populist criminal regime. The claim is that this justification cannot simply

⁸⁸ L. May, “Metaphysical Guilt...,” 248.

⁸⁹ Mathiasen, 240.

be abandoned as an “institutionalized lie.” The criminal reference to shared identity is morally relevant for each member of the group, though in different ways. Third (5.3), I return to the question of group solidarity, to demonstrate how it shapes collective moral responsibility and the patterns of its distribution in the aftermath of collective crime. The claim will be that moral taint is the appropriate sanction for decent members of the perpetrators’ group. Addressing the question of the duty to respond, I will identify two forms of collective moral responsibility that apply to decent people.

5.1 GROUP-SPECIFIC IDENTITIES CREATED BY CRIME

As opposed to an “ordinary” crime, in the case of collective crime one has to think not only about the perpetrator and the victim, but also about *all* members of the group in whose name the crime has been committed and *all* members of the victimized group. Crime creates subgroups, changes all their members’ moral properties, positions and relationships. At least four crime-specific groups can be distinguished: direct victims, indirect victims, agents who in different ways causally contributed to crime, and subjects of the criminal regime who are morally not at fault. This distinction is derived from the main features of collective crime, discussed in Chapter One. The features are: the number of perpetrators, the number of victims, variety of types of harm, the role of political authority, the ideological foundation of crime, the manner in which the victims were chosen, the character of response of the majority of subjects to crime and its justification, and, finally, the grave moral and political consequences that ensued and go beyond the direct harm that victims suffered.

5.1.1 *Victims*

A victim is a person who suffers from a harmful action and its consequences. Harm can be caused by different agents; it can be of different kinds; it can affect different people in different ways. In other words: the identity of a victim is shaped by the identity of the perpetrator, the character of the criminal act, and the way the victim is affected by the consequences of crime.⁹⁰ Collective crime is aimed against a whole group of people. From the moment of the formation of criminal intent, the targeted group is presented in organic terms, rendering the human autonomy of its members irrelevant. Denial of recognition, based on an ideologically dis-

⁹⁰ James Dignan, *Understanding Victims and Restorative Justice* (Maidenhead: Open University Press, 2005), 16.

torted view of the targeted group, and materialized through its members' exclusion from the society of morally equal human beings, becomes the central point of the victims' identity. Such forced change of personal identity from that of an equal member of society to that of a pariah, typically begins by activating and promoting—perhaps existing but until then politically illegitimate and morally non-dominant—cultural prejudices about the targeted group. The watershed is marked by allowing and officially supporting a public expression of “autonomous voices” that question loyalty, “discover conspiracies,” or point to those attacked as inherently less worthy. Civilizational constraints, which in decent societies prevent prejudice-holders from openly challenging standards of moral equality and decency, are now removed and replaced by a new ethics. This ethics demands social, legal, political, moral, and finally physical exclusion of the targeted group. The first reaction of the targeted people will be confusion, a mixture of disbelief, fear, and hope that things will somehow again become as they used to be.⁹¹ They will try to preserve a semblance of normalcy in their everyday lives, but such attempts will prove futile as soon as the regime gains majority support and formalizes discrimination against them. In the new condition, victims are denied the status of citizens and they are forced to live under constant humiliation and fear, deprived of any security. The identity assigned to them—false as it is—becomes nevertheless a fact. The murderous regime does not simply kill. The mistreatment of the Jews and other “less worthy” people in the Nazi concentration camps, or rape of the non-Serbian women by members of the Serbian military and paramilitary units in the Yugoslav wars in the nineties, demonstrate how mass killing stands at the end of a long process focused on the destruction of human dignity.⁹²

⁹¹ See e.g. Marion Kaplan, *Between Dignity and Despair: Jewish Life in Nazi Germany* (New York: Oxford University Press, 1998), 230.

⁹² “Once the moral person has been killed, the one thing that still prevents men from being made into living corpses is the differentiation of the individual, his unique identity... The methods of dealing with this uniqueness [...] begin with the monstrous conditions in the transports to the camps, when hundreds of human beings are packed into the cattle-car stark naked, glued to each other, and shunted back and forth over the countryside for days on end; they continue upon arrival at the camp, the well-organized shock of the first hours, the shaving of the head, the grotesque camp clothing; and they end in the utterly unimaginable tortures so gauged as not to kill the body, at any event not quickly. The aim of all these methods, in any case, is to manipulate the human body—with infinite possibilities of suffering—in such a way as to make it destroy the human person as inexorably as do certain diseases of organic origin” – Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace Jovanovich, 1973), 453.

The consequences of such crimes extend into the post-criminal society. Most importantly, the harm inflicted on victims continues to shape the identities of survivors, victims' families and the whole group. They suffer in different ways. Jon Elster distinguishes between material suffering ("loss of real or personal property"), personal suffering (harm to life, body, or liberty), and intangible suffering (lack of opportunities).⁹³ I will add moral suffering. Its origin is the most brutal denial of humanity to which victims were exposed during the reign of the criminal regime. It does not stop with the regime change and the beginning of transition to normalcy. As numerous moving accounts witness, the lives of so many victimized people remain shattered by the legacies of their tragedies. Formal recognition, in the form of returned citizenship and equal constitutional rights is not enough. Plainly, the people who suffered harm under a criminal regime retain their victim-specific identity after the crime.

5.1.2 On the side of criminals: agents, by standers, decent persons

I distinguish among those who causally contributed to collective crime and those who did not. To the former subgroup belong perpetrators and collaborators, as the agents who directly participated in crime, political and military elites who issued orders in their formal capacities, cultural elites who advanced normative and ideological claims promoting or supporting crime, and bystanders. Bystanders are persons who supported the criminal regime and its practices in different ways that are not covered by criminal and political responsibility. Their causal relationship with crime is indirect, yet clearly identifiable: while they did not take part in criminal action, their ethical stance, attitudes and goals correspond to those of agents. In Chapters Two and Three I explored different forms of bystanders' loyalty to the regime. The argument was that the existence of this particular majority is one of the core features of a populist criminal regime: without such a majoritarian support no collective crime would be possible.

The second subgroup is composed of persons who neither perpetrated nor were accomplices in crime, and who in no way contributed to creating the sinister attitudes and to setting up the regime. While they are similar to bystanders in that they did not directly engage in criminal practices, the

⁹³ Jon Elster, *Closing the Books. Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004), 168.

lack of both direct and indirect causal relationship to crime in their case points to their substantially different moral position. Accordingly, the question of distributing moral responsibility has to be attended in a manner that preserves the morally relevant distinction between the two groups. One way to preserve this distinction—a way that indeed appears as *the* way to properly handle the question of group-specific responsibility—would be to absolve those who are not morally blameworthy of any responsibility. To repeat, I disagree with this view, despite its intuitive, theoretical, and context-specific strong points. Why is this?

Recall that in Chapter One I defined collective crime as more than an aggregate of individual criminal actions. Thus, its evaluation is irreducible to assessing separate acts of discrete perpetrators, collaborators and bystanders. Second—and perhaps more controversial—because of its justification, purpose, intention, the way it was carried out and the character of the harm it produced, collective crime is irreducible to the collective action of a causally identifiable group of perpetrators, collaborators and bystanders. How to understand the claim that the agency of collective moral responsibility is broader than the feature of causality would suggest? The most important implication is that all group members are related to collective crime. A derived suggestion is that at stake is a type of relationship that makes them all responsible, albeit in different ways.

This claim is difficult to explain and justify. It extends the ascription of responsibility to persons: (1) whose values and attitudes were never supportive of the criminal ideology; (2) who contributed nothing to developing the criminal intention; (3) who did not participate in the criminal action; (4) who did not support the criminal regime and its acts in any identifiable way. The claim further implies that one's justified inability to oppose crime (e.g. due to the extreme pressure of circumstances), while being important for assessing the *character* of that person's share in collective responsibility, does not qualify as a reason to be *exempted or excused from* responsibility. More radically, the same holds good even for those persons who *did* oppose criminal practices. In short, the claim is that there can be situations in which each member of a collective is morally responsible, regardless of whether he or she participated in criminal action, regardless of his or her attitude, of whether he or she was able to oppose that action, or of whether he or she did oppose it.

This looks like a cruelly unjust statement, especially if we recall the real-life examples of heroism of people who dared to oppose the populist criminal regimes. Think about the life story of the German Protestant cleric Harald Poelchau, a member of the Christian opposition movement,

the Confessional Church (*Bekennende Kirche*).⁹⁴ As the chaplain of the Tegel prison in Berlin, between 1933 and 1945, he was in different ways—risking his life on a daily basis—helping political prisoners convicted for their opposition to the regime. As a member of the groups “*Kreisau Circle*” and “*Uncle Emil*,” he was one of the principal organizers of a complex network hiding and supporting Berlin Jews who were living underground. His biographers agree that his survival equals a miracle.⁹⁵

How can this man, and people like him, be held responsible for the Nazi crimes? How can one, faced with such examples of extraordinary human heroism and dignity, defend the identity-based argument of collective moral responsibility against the objection of unfairness? Besides, we have already seen that heroism is not the criterion of one’s moral rightness. The benchmark is substantially lower. Morally decent persons are those who neither shared nor exhibited hatred towards “others,” and who did not contribute to their suffering. The problem becomes additionally difficult once we recall that the judgment of collective responsibility does not follow from the evaluation based on autonomous group agency. At stake is not vicarious responsibility that would apply to persons saddled with membership in an accountable collective agency. Let me repeat that here I defend an individualist view of collective responsibility. The judgment applies to all group members, and its basis is the moral relevance of their relationships. Regardless of my causal link with the crime, it affects morally important aspects of my identity in a manner that demands some response. This duty to respond is best seen as the moral cost of my group membership. To defend this claim, I need to show that, in the face of the crime and its consequences, collective responsibility addressed to each

⁹⁴ The Founder of the Confessional Church was Martin Niemöller, the author of the famous poem that depicts the immorality of silence in face of a criminal practice:

*First they came for the Communists,
but I was not a Communist so I did not speak out.
Then they came for the Socialists and the Trade Unionists,
but I was neither, so I didn't speak out.
Then they came for the Jews,
but I was not a Jew so I did not speak out.
And when they came for me,
there was no one left to speak out for me.*

Source: http://www.jewishvirtuallibrary.org/jsource/Holocaust/Niemoller_quote.html.

⁹⁵ For more details about Harald Poelchau, see Peter Schneider, “Besser tot als feige,” in Stefan Aust and Gerhard Spöhl (eds.), *Die Gegenwart der Vergangenheit. Der lange Schatten des Dritten Reiches* (Reinbeck: Rowohlt, 2005), 320; Klaus Harpprecht, “Ein stiller Kämpfer,” *Die Zeit*, 41/2003.

group member is a morally proper requirement, and not an unjust construct. Let me immediately clarify one important point: while the claim of one's responsibility for crime strongly suggests a negative evaluation, this does not hold for responsibility of those who did not commit moral wrong.⁹⁶ Such persons are responsible without being blameworthy—as suggested above, I hold that for them, moral taint represents an appropriate moral sanction. Below I will return to the explication of this claim. Here I only state its most important inference: to defend the case of one's responsibility for an action or the state of affairs beyond one's causal contribution, means to argue for responsibility beyond blame.

5.2 HOW IDEOLOGICAL JUSTIFICATION OF COLLECTIVE CRIME AFFECTS MORALLY DECENT PERSONS

The starting point is the analysis of the ideological justification of collective crime offered in Chapter Three (Section 3.1.). To summarize: two features of this justification stand out. First, collective crimes are presented as actions done in the name of the whole group. Second, the reason for acting in the name of the group is group-specific good. The practice of collective crime is always presented in excessively ethical categories: no collective crime has ever been committed without a resort to perverted ethical arguments. Legitimation of the most horrifying crimes by recourse to the principles of justice, fairness, and the general good, is one of the most troublesome features of these regimes.

Further, in Chapter One I argued that mass atrocities can be identified as collective crimes provided three conditions are met. First, the crime unfolds as a coordinated, intentional action of a multitude of individuals. Second, crime is ideologically, legally and politically institutionalized and “normalized”: the political arrangements, legal norms and the system of values, beliefs and attitudes, are all shaped in a manner that allows, justifies, and makes routine the infliction of suffering on those who are arbitrarily proclaimed as enemies. Third, the majority of the regime's subjects interiorize the perverted value system, which is then expressed in their support for the regime, its ideology and actions, including the killing.

Still, this characterization of collective crime leads, in an obvious manner, only to the responsibility of those persons and groups who are in different ways causally responsible, from killers to bystanders. It tells us

⁹⁶ Sheehy, “Holding Them Responsible,” 22.

about the frightening fact that the majority was supportive of the killing of innocents. But why would this lead to the responsibility of those members who did nothing morally blameworthy? Suppose I opposed Milosevic's regime in Serbia, and the majoritarian attitude of my Serbian co-nationals to the wars the regime fought in Croatia, Bosnia and Kosovo: I was active in peace movements, I attended different peace demonstrations, signed anti-war petitions, tried to protect my non-Serbian co-citizens from different threats to which they were exposed; because of this "non-patriotic behavior," I lost my job. What makes me responsible for the crime?

Recall two important steps in Larry May's argumentation. First, while the sheer fact of membership in a non-voluntary group is beyond one's control, one is still responsible for who one chooses to be. I agree. Second, one's morally right course of action would absolve one from moral accountability for a crime. This I find less convincing. We have seen that for May, the morally right choice consists of distancing one's self from the regime, the morally corrupt majority, and, ultimately, one's social group. I would not be responsible if in a difficult context I express the right attitude towards the ruling beliefs, goals, intentional actions, and towards my membership in the morally tainted group which I did not choose to belong to. Given the gravity of the life under a criminal regime, May's argument could be softened to demand less than an expressive action of disassociation. If I can prove that my beliefs, attitudes and goals were never affected by the dominant ethics, the proper judgment would be that my choice—lack of the opposing action on my part—was not morally wrong, that is, that I lived up to my assumptive moral responsibility. The core of May's argument would be preserved: moral disassociation from collective crime is the choice that should be acknowledged as a symbolic cutting of the ties with one's group.

Still, I believe that such a choice does not exist. One can neither defy the fatalism of the argument of moral luck, nor can one meet the requirements of increased group-specific duties by assuming the act of moral dissent as a closing act of one's relationship with other group members. My group belonging and, in particular, my belonging-based relationship to crime do not end if I am able to prove that my moral values at the time of atrocity were different from the values invoked to justify the crime. My possible decision to emigrate could indeed be based on a principled reflection and insight into the inexcusable behavior of the majority of my co-nationals, rather than on an interest-based, rational calculus. Imagine a German who during the Nazi regime was heroically helping his Jewish co-citizens, and who, after the liberation, decides to leave the country,

because he or she is deeply disillusioned by his or her co-nationals' recent attitudes and practices. It might be that by leaving this person wants to cut off his or her links with the German state, society, and nation. But, this is not really relevant. Something else matters: he or she does so *because* he or she is a German.

May rightly argues that membership in a community implies an increased assumptive moral responsibility of each member. But the grave problem for a moral person in a morally corrupt society consists in the lack of choice and control. Despite being normatively competent, such a person, when confronted with an institutionalized crime that enjoys majoritarian support, is effectively deprived of the capacity to act in accordance with moral standards. This inability-induced omission directly affects his or her co-citizens targeted by the crime. This is so because their claim for moral equality in the context of crime turns into the expectation that other members will meet their moral duty of helping people in need. A morally decent person who cannot help is prevented from acting out of duty: he or she is deprived of the possibility to follow the basic moral maxim which requires that one recognize other people as moral equals. In such a society a moral person cannot lead a good life, because the official, majority-accepted, perverted ethics creates interpersonal relationships which deny human dignity and moral equality, and which deny the room for an alternative practice. This claim does point first to the brute empirical context, in which any act of dissent carries with itself an enormous risk, the risk no one can reasonably expect a "sensible person" to confront. Second, and equally important: living under the populist criminal regime effectively excludes a decent person from the moral community. The relational quality of morality, based on mutual recognition, exists only for the majority that supports the reigning ethics of evil. But exclusion from the ethical community does not equal exclusion from the group. Why is this?

Regardless of how much I would prefer to terminate the significance of my group identity to my individual morality, even regardless of my intention to break all ties with my nation, my national identity remains relevant, due to the moral relevance of the group structure. To argue that the actions or attitudes of dissent, like opposition to the regime, its ideology and practices, or emigration, separate my morality from the group morality comes down to the claim that the past, pre-criminal relationships can be made irrelevant by my proper action. This is not a plausible claim. I want to argue that a morally right attitude or reaction to collective crime is not a practice that severs ties of a decent person with his or her group.

Rather, the crime establishes itself as a new principal tie that binds us. The deeply problematic character of this tie necessitates raising the question of collective moral responsibility. To say that recent atrocities affect me, does not simply refer to the fact of my membership in the group implicated in the criminal practice. It affects me because it destroys an important element of my moral identity. The subject of destruction is the moral feature of the group structure, which prior to crime used to require each of us *qua* group members to respect, as our own, its basic moral standards.

Let me draw two important inferences from here: first, the set of relationships defined as the group structure is *dynamic*; second, it is *always important* for each group member. Dynamism does not only mean that the group structure changes over time; it also points to the change as a core feature of the group identity. The change is sometimes observable only along a longer stretch of time. This happens when through the lifetime of several generations the group does not experience major political, social, or cultural breaks. In such societies, values, beliefs, rules and institutions that shape the group structure are stable. In contexts like these, group members typically will not ask ultimate questions about the ideational, moral and institutional framework of their life together. They will accept the structure of their relationships as something self-comprehensible—the reference is to a group relationship assumptively shaped by an interplay of universal moral standards and the group-specific ethics. But it is not always like that. A prolonged societal crisis followed by an abrupt political, cultural or moral change, results in a different dynamics, which forces each person to rethink his or her status and identity. Confronted with the break in what used to seem like the continuity of historical time, and especially, like the stable pattern of the existing value system, people have to ask questions that concern both individual and group identities: “How should I live?” “What should I believe?” “Where do I come from?” “Why are we together, and how should I relate to my co-members?” “How should we treat people who do not belong to our group?” All these questions become context-specific, and they have to be asked against a background of the events that brought them to the surface.

In the aftermath of the crime each causally non-responsible member is thus left with a choice very different from opting out of the community: they ought to reflect on the context-specific meaning of morality of their membership and shared identity. Foundations of this duty are partly explored above. Let me return to these arguments and try to explain how exactly they apply in the aftermath of collective crime.

5.3 SOLIDARITY, TAINT, AND RESPONSES

5.3.1 *Solidarity revisited*

In Section 2, I argued that individual responsibility is a relational concept based on shared moral standards. The argument of Section 3 was that the relational quality is also at the heart of the concept of the group structure. To be a member of a large, nonvoluntary, intergenerational social group means to live in morally important relationships—the character of these relationships defines shared identity. It follows that one particular social practice happening within a clearly delineated time period cannot be judged alone, in its causal and temporal perspective only. It should rather be evaluated against the background of pre-existing communal relations. On the other hand, while a person can only exceptionally claim that his or her individual contribution has changed the group identity in a directly recognizable way, each of us is a co-author of the moral universe by which we abide. This holds both for the internal relationship among us as group members, and for our relationship as group members with persons who do not belong to our group.

An important inference is that group-specific ethics is not merely a set of constraints into which we are born and which preempt our moral horizons, or constrain the room for morally right action. The fact of belonging to a non-voluntary group is never purely a matter of luck. It is only by coincidence that I am a member of a large nonvoluntary social group—a nation, race, or citizenry—but the moral horizon I share with my fellow members is neither fully nor primarily contingent. This moral framework cannot exist without a continuous reflection on both universal moral standards and the group-specific values. First, group membership demands a higher-order reflection: we ought to identify, and acknowledge as valid, duties stemming from the universal principles of individual autonomy, equality, and justice. These principles form moral standards that are valid for all of us, but not only for us. It is important to highlight that moral universals are not the products of some abstract reason, which would “come from above” to bind each individual. Rather, they are communicative principles that govern human relationships *here and now*: the fact that they apply to *all* humans does not deny either their specificity, or any moral agent’s duty to internalize them. Their presence in the group structure is the criterion of the group’s decency. However, the group structure is never based only on moral universals. It also abides by the rules of the group-specific ethics, which reflect the values particular to a certain place, time and the historically stabilized structure of interpersonal relationships—these standards are valid for all of us, but only for us.

In this interplay between moral universals and group-specific ethics, it is the former that presents the benchmark. Our group-specific values meet the ethical requirements of the good provided they remain within the normative framework shaped by universal morality. The requirement that I as a group member treat non-members in a certain way will stand the test of moral justification only if it can be demonstrated that this treatment—regardless of how context-specific it is—never falls below the requirements of universal morality. There could be situations in which I will owe more to the members of my group than to the other people, but this “more” should never provide a license for not treating those others as my moral equals.

The combination of these two levels of valid moral rules provides for the core of internal group *solidarity*. Once we accept that the basis of our commonality is shaped by an interplay of our group-specific values and moral universals, our sense of solidarity will not be reducible to an unquestionable emotional attitude to our co-members and the group as a whole, which would be based merely on shared belonging. Rather, solidarity emerges as a normative feature of the group structure that guides both internal group relationships, and relationships with those who are not members. It requires from each member a critical reflection on individual and collective practices. Understood in this way, solidarity is the foundation of the possibility and necessity of collective responsibility, in its assumptive and retrospective aspects. As members of the group bound by ties of solidarity, we have nonvoluntary duties. In particular, we are duty-bound to reflect on our values, attitudes, goals, intentions, and actions in the *I–We perspective*. What does this mean? Following Christopher Kutz, the question of causal responsibility for a particular collective action cannot be resolved without reference to its relational and positional features. Put simply: in order to take an appropriate stance towards what happened, we need to go beyond that particular action, and try to understand and evaluate the nature of the agents’ relations to “particular others,” be they agents, fellow members or the addressees of the action.⁹⁷ The causal aspect of the action corresponds to the *I-perspective* (where the “I” refers to the agency of the collective action), while its relational aspect covers the *We-perspective* (where the “We” refers both to the group structure, and to those who do not belong to the group but are affected by the collective action).

Assumptive collective responsibility underlines the moral demands imposed by the group structure on members. First, we are duty-bound to

⁹⁷ Kutz, 4.

care for one another because it is the right way to live together, and because it is the way to make the lives of each of us good. Second, we are duty-bound to recognize people who do not belong to our group as our moral equals, because this is the right way to treat them and because this confirms our status as morally decent persons.

In a retrospective sense, we are responsible for collective intentions and actions. Beyond the intentions and actions of which we are agents, we are accountable for those to which we are relationally connected by the duties stemming from solidarity. Retrospective collective responsibility is about the moral appraisal of the actions that can be attributed to the group. Responsible agents are individual group members, all of them, though in different ways. Due to the character of the internal group relationships, any intentional action that qualifies as a collective one provides the basis for a distribution of collective responsibility among all group members. To explain this, I need to further specify the notions of collective intention and collective action. The aim is to show that there could be situations in which some members of the group act together on the basis of a certain interpretation of the shared intention, affecting all members of the group in a manner that leads to their responsibility.

For an intention to qualify as a collective one, it first has to be presented in terms of the goals common to the members of a social group, which will be followed by the explication of the corresponding expectations and duties. But this does not imply that such goals have to be indeed, shared by each group member. First, the commonality is a matter of interpretation, which presents the chosen goal as right, good, and worth everyone's acceptance; this interpretation may be performed by different agents who rely on different sources of knowledge and norms. Second, identifying common goals will typically demand that the interpreter has some authority, formal or informal; the need for authority becomes clear at the stage of the formulation and realization of the goal-specific expectations and duties. Third, such an authoritative creation of the collective intention itself has to rely on a certain interpretation of existing normative relations. What is required is an affirmative interpretation, which would argue that a particular collective intention affirms the core relational and positional features of the group structure. It follows that collective intentions are normative in two related senses. First, we can form and present something as a shared intention because we as group members share, and we are supposedly committed to, a set of moral norms. Second, by formulating a shared intention we do not only commit ourselves to its realization through a collective action. We also accept, if only implicitly, the duty to

act collectively in a manner, and towards the outcome that will uphold a certain interpretation of the group-specific ethics.

If collective intention relates to the group structure in morally important ways without requiring that everyone shares it, then the collective action is not reducible to an action intended and performed by all group members either.⁹⁸ The concerted action of more than one group member becomes a behavior morally relevant for all members provided it meets three conditions: first, the action should be a collective project oriented towards purposes which are presented as group-specific; second, the action should indeed affect all group members; third, the action should have a clearly explicated moral dimension. When we say that a social group acts, it is actually some of its members who act together, but in acting so they (1) rely on the communicative principles and intentions that can somehow be related to the group structure, and (2) create something that cannot be understood in individualistic or agency-specific terms, because it produces, or aims to produce the condition that is relevant also for those group members who do not participate in it.

In short, some intentional collective actions and their outcomes are of such a moral magnitude that they cannot be properly conceptualized either in terms of individual morality, or in terms of a morality specific to the agents of the action.⁹⁹ An action or a practice that claims its basis in group-specific moral relationships affects all members, because the group morality is only a shorthand for a set of norms that each member accepts as his or her own. Such an action has to stand the test of moral justification.

As reflective persons bound by the ties of solidarity, we have to apply the justification test in three distinct time periods. We have a duty to ask whether a particular collective intention that is being formed (at T1), and the collective action that follows (at T2), are morally defensible. To repeat, this does not necessarily entail the duty to oppose the morally harmful collective action: the risk to personal safety is sometimes too high. Besides, there could perhaps even be situations in which we will have to excuse some forms of support for a harmful action. But no moral person

⁹⁸ In this sense, a collective action differs from a joint action, where the goal, intention, actual performance, and responsibility are limited to causal agents: "[...] Each of them intentionally performs an individual action, but does so with a true belief that in doing so he or she will jointly realize an end that each of them has [...] Agents who perform a joint action are responsible for that action." – Seumas Miller, *Social Action. A Teleological Account* (Cambridge: Cambridge University Press, 2001), 238.

⁹⁹ Tracy Isaacs, "Collective Moral Responsibility and Collective Intention," in French and Wettstein (eds.), 63.

can ever be absolved of the duty to realize that the action in question is morally wrong. If the latter claim holds, then we also need to consider the moral condition in time after the action (T3). Some collective actions change moral relationships, reconfiguring positions of *all* group members within the group structure. For this reason, all members are duty-bound, or are responsible, to reflect on the newly created moral situation.

5.3.2 *Moral taint*

I want to present moral responsibility for a collective crime as a duty of all group members to reflect on what happened, and to act in a morally appropriate manner. Responsibility as reflection should combine: (1) gathering, publicly presenting, and publicly acknowledging the facts about the crime; (2) publicly acknowledging the moral relevance of the crime and the impact of its legacies on the post-criminal condition; (3) defining the morally required goals and intentions and working towards their accomplishment through the appropriate collective actions. Let me focus on the latter two features.

The second feature—public acknowledgment of the moral relevance of the crime and its legacies—requires juxtaposing the post-criminal moral condition with the two preceding moral conditions: the morality that used to be valid before the crime, and the morality that reigned while the crime was being undertaken.

The assumption is that before the crime we used to base our life together on the combination of universal moral standards and the group-specific ethics, which provided the criteria for the rightness of everyone's intentions and actions. Hence, the point of departure is assumptive moral responsibility, understood as the duty to uphold morally valuable relationships. From each member, it requires a reflective stance towards the attitudes, practices and actions that take place within the group, especially those that qualify as collective acts, and that may lead to changes in the group structure. This duty to reflect stands at the core of retrospective collective moral responsibility. If, on reflection, we find that a particular collective practice—its normative basis, goals, or actions—affects the group structure in a way that cannot stand the test of valid morality, our solidarity will require that we *all* act as responsible persons, that is, we *all* respond by disassociating ourselves from that practice.

So even in the absence of a discrete identifiable collective act whose unwanted consequence is the harm in question, agents can think of themselves as participants in a col-

lective venture. As moral critics of our own and others' actions, we can draw upon preexisting contexts of social interaction in order to create a sense of shared venture [...] The basis of accountability is still individualistic, and indeed is reinforced by individual moral reflection, because we are asked to reflect on the interactions that already, concretely, structure our lives [...]¹⁰⁰

In this way, retrospective collective moral responsibility is identified as each member's *duty to respond* to a harmful practice committed in the name of the collective. This points to the conceptual primacy of the individualist perspective in the morally relevant social context: collective crime impinges on each group member and calls for the appropriate response because of the relational and positional qualities of one's individual identity. The group members are all, albeit in different ways, responsible for the collective crime because it violates the settled—at the time of the crime valid and interiorized—legitimate structure of the solidarity-based moral relationships.

But how exactly does the collective crime affect the group structure, requiring in turn, collective moral responsibility? Recall that it is committed in the name of the group, and presented as an action based on, or at least unambiguously worthy of the consent of all members. In other words, the crime is presented as a practice adopted for the good of the whole group. However, in reality, a collective crime is distinguished by several features that radically differ from its ideological justification. At the same time, none of these features point to the exclusive responsibility of the agents, this regardless of how broadly we conceptualize participation. To the contrary, these features provide the basis for a context-specific collective responsibility. First, collective crime presents a drastic departure from the mutually supportive interplay between the universal right and the collective good. This departure consists in abandoning the moral universals and in falsifying group-specific ethics through the establishment of a perverted ethics of evil. As a result, criminal practice changes the positional and relational features of the group structure substantially. Before the crime we were all moral equals. During the crime, moral equality of *all members* of the victimized group was denied in the cruelest possible way on behalf of the new moral position of *all members* of the perpetrators' group. After the crime we find the members of these two groups positioned by legacies of what they had to endure, what they did, or what they did not do—there are people who in different ways suffered, those who in different ways contributed to harm, and those who did nothing wrong, but are confronted with the question of

¹⁰⁰ Kutz 2000: 189.

the right attitude to the legacies of the actions committed in their name. These different moral positions in turn, affect the nature of the relationships between members of the group, creating new demands and duties that are distributed unequally among subgroups.

The reference to new demands and duties indicates a context-specific suspension of the principle of moral equality. We cannot simply resume the condition of moral equality as if nothing had happened. This would be both empirically impossible and morally wrong. Empirically, the legacies of the criminal past remain relevant in different ways, for the communities of victims and perpetrators. The past haunts all, though in different ways, and to deny its relevance by promoting the strategy of closing the books amounts to a choice that is both morally wrong and practically-politically untenable. In moral terms, harm violates norms that govern human commonality by depriving some people of the moral recognition everyone is entitled to. It creates a new relationship, identified by inequality and abandonment of the principles of mutual respect and equal concern. This further affects moral relationships in a post-criminal society. The general duty of responsiveness to requirements that set up and protect moral equality temporarily ceases to be of primary concern. In its stead comes a contextually shaped relationship, typified through a set of harm-specific duties and requirements. These duties and requirements are asymmetrical, pointing to the differing positions of agents and victims.¹⁰¹ In this regard, the moral status of victims is defined by two elements. First, victims and their community do not have any special harm-related duties towards perpetrators. Second, general duties that would have shaped their relationship to all the other members of the community had the crime not happened, turn into their right to demand a proper reaction from those associated with the criminal agency.

On the other hand, the perpetrators and members of their group face the harm-specific duties in the transitional period. Their moral condition urges appropriate responses from each of them. What is an appropriate response will depend on one's relation to the crime, but the core claim is that by changing the group-specific ethics, the crime compromises each member's moral integrity: "It forces upon the individual a reassessment of who she or he is."¹⁰² I may have disassociated myself from the criminal practice, but this does not cancel the fact that when the collective intention was shaped and when the action was performed, I belonged to the social

¹⁰¹ Kutz, 38.

¹⁰² L. May, "Metaphysical Guilt...", 242.

group whose collective good was invoked as the very reason for killing. After the crime, I still belong to that group, and I find its moral identity disturbed and distorted by the criminal practice and its legacies.¹⁰³ If individual morality is a relational and positional category, ripe with the others-specific individual moral duties, and if belonging is not a matter of choice, then the group's corrupt morality affects a decent person. A decent society has somehow become a crime-supportive society, which is the transformation that affects each of its individual members: one of the basic conditions of each member's humanity has been altered.

This change does not imply only that my opportunities to live a morally good life are severely damaged. My life is confronted with a set of new challenges. The group values, norms and legitimate practices have all been changed beyond recognition by the intentional action of my co-members who proclaimed our shared belonging as the reason for killing the people of another identity. In such a context of the group-specific fall below the civilizational minimum, my duty to reflect on atrocities is principally backward-looking.¹⁰⁴ The crime committed in my name is in a particular sense the ultimate fact: its ideological foundation, the character and the scope, are such that it (1) becomes the focal point of the group structure, and (2) penetrates my individual identity. The foundation of my responsibility then becomes the crime-specific identity I share with the perpetrators. It is only by coincidence that I am a member of a nonvoluntary social group which has a distinct identity—say, a nation—, but the crime was consciously and systematically committed in my name. Relational and positional features of my individual identity are affected by the harmful and intentional action of the people with whom I stand in important moral relationships. The fact that my inclusion in the ideological pattern of the crime rested on the ideological manipulation and an institutionalized lie, which I perhaps consistently opposed, is not relevant in the face of what has been done. Once the innocent people are killed, the lie expressed in my name has ceased to be a mere lie: it has become the moral fact. This is why the mere fact of my group identity yields my duty to acknowledge the injustice done, as well as the victims' right to demand from me an unambiguous, public demonstration of disassociation from the crime.

My moral burden is neither individual guilt, nor moral blame, because these can be inferred only from what one has intended or done. Still, I suffer

¹⁰³ Kutz, 188–189.

¹⁰⁴ David Cooper, "Responsibility and the 'System,'" in Peter French (ed.), *Individual and Collective Responsibility. Massacre at My Lai* (Cambridge, Mass.: Schenkman, 1972), 90.

moral loss, since the crime ties my identity in a particular way, both with my fellow members' identity and with the identity of victims: the former killed the latter in my name. This makes me morally *tainted*.¹⁰⁵ Although I have not done it, it points to who I am.¹⁰⁶ Recall that "a sense of solidarity is integral to the identity of a tainted party."¹⁰⁷ Following Larry May, recall also that solidarity increases one's responsibility by posing the requirement of authenticity, which includes "appropriate kinds of attitudinal response a person should make concerning the life situations he or she faces."¹⁰⁸ The situation of the mass atrocity, argues May, puts a decent person to the sternest possible test, posing the moral requirement of disapproval. In effect, responsibility extends beyond one's direct causal role:

It does not matter whether or not there was anything that most Germans could have done personally to change the outcome. We should not engage in simple "guilt by association." But in the German case, some people were aware of what was happening and could, by the ability that all people had, to denounce, or at least disavow, the atrocities, thereby distance themselves from the harm. Given this ability, then at least some taint in question remains connected both to what a German tried (or failed to try) to do, and to who that German is. And in these cases taint is appropriately seen as a form of responsibility for who one has chosen to be.¹⁰⁹

Moral taint in May's theory then stands for responsibility of decent persons for failed action, inaction, and for the chosen identity, both at the time that preceded the crime (when wrong attitudes had been shaped—T1), and at the time when the crime was committed (T2). Relying on what has been said so far, I offer two features of moral taint that differ from May's account. First is its extension to all morally decent members of the perpetrators' group. Second, while keeping May's concepts of solidarity and authenticity, I apply them also to assess moral responsibility in the post-criminal condition (T3). I believe that decent persons—at least in the extreme situation of a populist criminal regime that is of interest to me here—are not tainted by their failure to denounce and condemn atrocity.

¹⁰⁵ "Moral taint occurs when a person's moral record has been compromised by the introduction of something that produces disfigurement of the moral personality." – Marina Oshana, "Moral Taint," *Metaphilosophy*, Vol. 37, Nos. 3–4, 2006, 355.

¹⁰⁶ This is a variation of Bernard Williams' theme on the "mature agent's" moral suffering and loss: "What I have done points in one direction towards what has happened to others, in another direction towards what I am." – Bernard Williams, *Shame and Necessity* (Berkeley: University of California Press, 1993), 92.

¹⁰⁷ Oshana, 360.

¹⁰⁸ L. May, "Metaphysical Guilt...", 243.

¹⁰⁹ *Ibid.*, 251.

As I have tried to show in this Section, the source of taint is the group's effective acceptance of the ethics of evil as the new valid basis of the group structure, which in turn affects everyone's moral standing. Moral taint first suggests the way in which decent people are affected by this civilizational fall; second, it points to the duties they have in view of their moral position.

The first feature highlights the non-vicarious character of responsibility of decent people. Their identity is adversely affected by people who are close to them in the particular way. The crime is made possible due to an effectively implemented interpretation of the structure of *our* moral relationships. To repeat, in difference to May, I do not believe that, by failing to disapprove of the criminal attitudes and actions of fellow members at T1 or T2, decent persons practically "allow those members to define our group, and by extension, us."¹¹⁰ Actually, I only disagree with identifying "allowing" as the cause of a decent person's responsibility. But I accept that evildoers have redefined both my group and me. And the regime change itself does not bring the group structure back to civilized normalcy. In Chapters Two and Three I argued that the group values do not change spontaneously; the group enters the new stage of its history burdened with criminal legacies. In consequence, a member of such a society has to ask what solidarity and authenticity require in the given condition. To the extent that my authenticity is shaped by the character of group solidarity, I cannot simply claim that, in virtue of not succumbing to the ethics of evil, I have remained authentic. I cannot be authentic as long as the relationship of solidarity within my group is based on the violation of the basic standards of right and good, or on an ensuing silence and denial. If my group fails to reflectively attend to, and explicitly revise its criminal ethics, I will remain a morally impaired person. Thus, I am duty-bound to—*I am responsible if I*—take part, together with all other members of my group, in the reflective process that would aim at changing the post-criminal condition. The only way of doing this leads through confrontation with yesterday's ruling ethics, which in turn requires confronting moral facts about the crime.

¹¹⁰ Cassie Striblen, "Guilt, Shame, and Shared Responsibility," *Journal of Social Philosophy*, Vol. 38, No. 3, 2007, 477.

5.3.3 *Two forms of collective responsibility*

Collective moral responsibility in the post-criminal context is each member's *duty to respond*.¹¹¹ Distribution of responsibility respects the principle of moral autonomy: duty to respond corresponds both to the individuals' causal involvement in crime, and to their new moral position. Above, I argued that the identity-based ascription of responsibility to people who did not contribute to harm is non-vicarious. Members who are not morally blameworthy have the duty to take an explicit moral stance towards the crime committed in their name for two principal reasons: the character of their relationship with members of the victims' group, and the morally compromised character of their own group structure. Therefore, we can identify two forms of duty to respond that apply to decent persons (though not only to decent persons). First, they ought to address the victims and to acknowledge the moral and factual import of the crime. This means acknowledging the victims' suffering, and the unjustifiability of practices that led to that suffering. The second duty is that of self-reflection by members of the perpetrators' group. At one level, this duty is not goal-oriented at all. It originates principally from the group-specific failure to meet the general duty of sustaining a particular moral relationship which forms the basis of a shared assumptive responsibility. At another level, the aim of self-reflection would be to recapture the status of group members as moral agents, and to re-establish the inner morality of the group structure, in a manner that would clearly demonstrate cultural and political return to moral universals. These duties are context-specific. First, they are triggered by the crime. Second, they can be conceptualized only against a background of the relational and positional qualities of the life together. We are all duty-bound to react to the criminal action in our capacity as members of the group which recently, in the cruelest way, abandoned universal moral principles.

The first form of collective responsibility is our duty to speak to the victims and their community. If we consult the etymological meaning of the term responsibility—a duty to provide somebody with a response—then the victims have the moral right to demand an answer to the question of how and why the collective crime, an act hardly comprehensible to any normal person, did indeed become a reality. At the same time, they are the first addressees of that answer. By providing the response, we publicly acknowledge the fact we privately know very well: killing of innocent people took

¹¹¹ Linda Radzik, "Collective Responsibility and Duties to Respond," *Social Theory and Practice*, Vol. 27, No. 3, 2001, 465.

place, and it was carried out in our name. It is the victims' right to expect this public utterance from all of us, and not only from those causally responsible for their suffering. This is so, because evil was inflicted on them, and their human integrity and dignity were most cruelly violated in the name of all of us. I may have never agreed with the crime, I may have publicly distanced myself from it, or even actively resisted it, but the victims and their loved ones do not know this, nor do they have a duty to know. If some people were killed, or in different ways harmed by some Serbs, in the name of all Serbs, because they were non-Serbs, we cannot require the people who survived this suffering to individualize their experience and its source. We cannot simply say: "You are the free citizen A. Your status of a legal and moral equal was violated by the blameworthy action of the citizen B. B is accountable for this action and he will be brought to justice. This will settle your matter." Such a statement, if left as the exclusive account of the crime, would amount to a cynical falsification of the past, which would only further ruin the human dignity of the victim. The victims of the collective crime were not targeted as individuals; neither would it be enough to say that they were attacked because of their group identity. They were marked following an interpretation that provided a new account of both their, and the perpetrators' group identity. At the core of this interpretation stood a new ethical account of the relationship between the two groups, which presented killing innocents as a morally justified act. The interpretation would have been impossible without reshaping the perpetrators' group structure. In other words, the killing would have been impossible without a new ethical pattern that effectively revised the relational features of this group. After the regime change, the members of the targeted group do not have any reason to assume that the values that underlined the atrocities are not at the core of the perpetrators' group structure anymore.

Addressing the victims and their community is not a symbolic, one-time act, but rather a process. Most probably, this process should take as long as the victims feel what Linda Radzik calls "reasonable fear." Reasonable fear, as the victim's attitude towards me and my group, could be rephrased in the following way:

Even if I believe you did not kill with your own hands, I don't know how you feel about the people who did. I don't know if you encouraged or approved of them. I don't know whether you will act like they did in the future. So I am afraid of you. If you apologize, if you express regret, I will have less reason to be afraid, and maybe we can find a way to live in peace together.¹¹²

¹¹² *Ibid.*, 466.

In short, a powerful reason for the joint responsibility of all members of the group consists in the insight that the victims, even if they are not prone to collectivizing the guilt and the responsibility, keep reminding us of the link between our collective identity and the crime.

This does not mean labeling the group, nor ascribing collective guilt or collective blame to it. Collective moral responsibility is a category of practical morality, which attends to the question of what we owe to each other in the aftermath of moral catastrophe. This brings us to its second aspect, where responsibility is seen as the duty to establish and develop collective self-reflection as a special relationship among the members of the perpetrators' group. The principal point of collective self-reflection should not be condemnation, ascription of guilt, paving the way for official apologies, nor even reconciliation with the people who suffered. Our shared responsibility consists in choosing to which moral community we will belong.

This is an unusual claim. Members of involuntary, intergenerational social groups are not typically in a position to consciously reflect on, and work towards selecting the moral coordinates of their shared identity. But crime creates the predicament, from which *the duty of moral choice* follows. In Chapters Two and Three, I have tried to show—against the claims of silence, denial, and deterministic relativization—that after the change, the crime and its legacies remain as one of the focal points of group identification. Group members are still tied by the common culture. But all the features of that culture—rules, normative distinctions, traditions, memories, and the like—are now impregnated by the crime. Our group identity has become a crime-specific identity.

Where do we go from here? Choices are limited, and the room for compromise is much narrower than it is sometimes assumed to be in the literature of transitional justice. After the regime change, we can choose between stating that collective crime does not morally matter, and acknowledging that it does morally matter. If the past is left unaddressed, or if it is thematized through political and cultural strategies of silencing, relativization, and denial, we effectively choose the first option. This choice implies a negative claim (regardless of the intention of the agents of choice): yesterday's injustice does not matter; accordingly, victims are not worthy of being done justice today. It implies a positive claim—again, regardless of what agents say, or what they believe to be aiming at—as well: those who are causally responsible for the collective crime are worthy of our protection. The group or community that chooses this option

decides to preserve the group structure, that is, the morally important relationships stabilized under the criminal regime.

The second option is to ask what it takes to be a decent human being, living in a decent society after a collective crime. The point of departure is the insight that our belonging to an intergenerational social group—with all its historically induced contingencies, identity patterns, traditions, and legacies—is not a matter of choice. But, when confronted with the legacy of the crime committed in the name of our shared identity, we have to address the question: “Who are we?” This is not simply the question of a reliable sociological discovery of what we have in common; neither is it the question of the right normative interpretation of the social thesis. The question reads: “Where do we go from here?” And it requires looking back, and asking: “What *ought we to* have in common, in light of what we did and what happened to us?”

We need to reflect on the character of our group structure after wrongs; from this reflection, *we have to learn*. Our social group and the state are rightly seen as morally suspect. As members of the tainted group, and as citizens of the state that has been built on the ruins of the criminal regime, we have to examine the past in a non-utilitarian manner—forward-looking arguments or transition-specific constraints are not legitimate reasons to limit the character and scope of reflection, or to abandon it altogether.¹¹³ The reflection will first reveal an analytically valid insight: in consequence of the collective crime, our group structure, that is, the character of the internal group relationships, and the status of each of its members, has undergone a transformation. The continuity of civility, understood as an uninterrupted validity of universal moral standards that form the basis for binding distinctions between right and wrong, has been broken. We cannot start our world anew, as if nothing had happened. Only seemingly paradoxically, the strategy of a new beginning, which claims moral irrelevance of the past, would keep that past alive, by preserving the continuity between yesterday’s and today’s normative patterns. For this reason, we have to look back, and ask how to mend our world.

The only way to break the normative continuity is to keep the book on the past open, and to start a process of creating a radically new moral foundation for the community: call it the requirement of *transformative*

¹¹³ According to Habermas, the goal of such reflection would be to bring about “mentality change [...] which would abandon yesterday’s self-understandings as useless ruins.” – Jürgen Habermas, “Die neue Intimität zwischen Kultur und Politik,” in *Die nachholende Revolution* (Frankfurt: Suhrkamp, 1990), 17.

justice.¹¹⁴ The objects of transformation are those patterns of beliefs, attitudes, and values which were shaped, in the recent past, into the distinctively unjust group structure. Responsibility as the reflective process would focus not only on the facts of the crime, but also on the widespread culture of tolerance of injustice, which decisively marked the preceding period.¹¹⁵ We are duty-bound to acknowledge to ourselves that it was our group structure—the nature of our relationships, formalized in the ruling interpretation of our shared identity—that made killing of the innocent human beings possible. Following this moral fall, the objective of transformative justice would be to bring to everyone's attention a sense of the recent condition, in which basic civilized values were suddenly made irrelevant.¹¹⁶ In this respect, moral responsibility thematizes the insight that in the criminal regime, many people have effectively renounced already valid and accepted standards of distinction between right and wrong, good and bad, just and unjust. Transformative justice concerns our internal group relationships, and it asks about the price we ought to pay—both individually and as a community—in order to regain the right to be perceived as decent human beings living in a decent society. In other words, we need to prove something that is not obvious at all: first, that we deserve to be treated as moral individuals, that is, as human beings capable of living in accordance with the standards of right and just; second, that our society deserves to be treated by others as a decent society. As the moral duty that stems from the relationship between the crime and our group identity, it should remain independent of transition-specific political and social considerations. While it is true that we cannot reach a democratic normalcy without transforming our values, the justification of transformative justice is not principally based on the prospect of a better—not even morally better—life for tomorrow. Rather, it is our *debt* to the past.

¹¹⁴ My use of this category is inspired by Jonathan Allen, "Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission," *University of Toronto Law Journal*, Summer, 1999, 335–337. See also David Dyzenhaus, "Justifying the Truth and Reconciliation Commission," *Journal of Political Philosophy*, Vol. 8, No. 4, 2000, 492.

¹¹⁵ Allen, 335.

¹¹⁶ Jeremy Waldron, "Superseding Historic Injustice," *Ethics*, Vol. 103, No. 1, 1992, 5.

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“Dimitrijevic’s book is a highly original contribution to political and moral philosophy in general and the study of group responsibility in particular. The text is clearly written, carefully argued, and quite persuasive, even at the points where I disagree with the author. It is at times simply brilliant.”

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